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Supreme Court of the United States

OCTOBER TERM, 1978

THE HONORABLE LOUIS J. GILIBERTO, Judge of the Circuit Court of Cook County, Illinois, et al., EITAN ARONOWITCH, et al.,

Petitioners,

vs.

COMPAGNIE NATIONALE, AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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THE HONORABLE LOUIS J. GILIBERTO, Judge of the Circuit Court of Cook County, Illinois, et al., EITAN ARONOWITCH, et al.,

Petitioners,

vs.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners, Honorable Louis J. Giliberto, Judge of the Circuit Court of Cook County, Illinois, Eitan Aronowitch, et al. (80 other named plaintiffs), respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Illinois entered in this case.

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 74 Ill.2d 90, 383 N.E. 2d 977 (1978), and is printed in Appendix A hereto.

JURISDICTION

The opinion of the Illinois Supreme Court was filed and entered of record December 4, 1978. Mandate was

issued by the Illinois Supreme Court December 29, 1978. The Judgment of the Illinois Supreme Court became final on December 29, 1978, or in the alternative, on December 4, 1978. This Petition is filed within 90 days from December 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). In particular, petitioners state that they, although aliens, principally citizens of Israel, have rights, privileges and immunities which have been especially set up and which are claimed under the Constitution of the United States and treaties between the United States and Israel and France, which rights, privileges and immunities were denied to them by the Illinois Supreme Court.

QUESTIONS PRESENTED

This case involves an action in the Circuit Court of Cook County, Illinois against the defendants, Compagnie Nationale Air France (Air France), Singapore Airlines, Ltd. (Singapore) and Gulf Air Lines (Gulf), brought by plaintiff Eitan Aronowitch and some 80 other named plaintiffs, principally citizens of Israel, to recover damages for injuries suffered by the plaintiffs or for the deaths of four of the decedents. Plaintiffs alleged their injuries and deaths resulted from the hijacking of an Air France plane, known as Flight 139, which was scheduled to fly from Tel Aviv to Paris, with a stopover in Athens. The aircraft was hijacked by four terrorists shortly after leaving Athens.

The plaintiffs charge that the hijackers had successively traveled aboard commercial aircraft operated by Gulf, from Abu Dhabi to Bahrain, by Singapore, from Bahrain to Athens, and by Air France, from Athens destined for Paris, but which latter flight was hijacked initially to Benghazi, Libya and thereafter to Entebbe,

Uganda. The suits were filed in such court on the basis that all three airlines carried on significant business in that jurisdiction and were subject to *in personam* jurisdiction of that court.

Air France moved to dismiss the action on the ground that the Court lacked subject matter jurisdiction of the action by virtue of Article 28 of the Convention for Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention (49 Stat. 3000 *et seq.*), and also moved that the suit should be dismissed under the doctrine of *forum non conveniens.* Singapore moved to dismiss the action on the latter ground only.

Plaintiffs alleged, in substance, that the State Court of Cook County, Chicago, Illinois, was uniquely situated to render justice to plaintiffs *and* to the three airline defendants because it had *in personam* and subject matter jurisdiction as to all defendants and that all issues could be resolved in that one court; that otherwise, plaintiffs would have to sue different defendants in different courts in different countries with different lawyers, different langauges, different rules. The questions presented for review are:

1. Whether the Warsaw Convention is applicable to all of the claims of the plaintiffs against Air France, their common carrier.

2. If all of the claims of the plaintiffs are governed by the Warsaw Convention, does Article 28(1) bar the action of the plaintiffs against Air France in the State Courts of Illinois. This question involves:

   A. Whether any jurisdictional defense, if any, of Air France was waived, by reason of its generally appearing in the Illinois State Court. This in turn

involves whether Article 28(1) involves "subject matter" jurisdiction.

B. Whether Air France was "domiciled" within the United States within the meaning of Article 28(1) in that it carried on substantial business on a regular basis in the United States and in Illinois, so that suit was properly instituted in the Circuit Court in that state.

3. Whether the Warsaw Convention, if applicable, is unconstitutional insofar as it purports to deprive the alien plaintiffs of their right to file suit in the Circuit Court of Cook County, Illinois.

4. Whether the Illinois Supreme Court denied due process and equal protection to the alien plaintiffs in dismissing their suits. This question in turn involves:

A. Whether the Illinois Supreme Court discriminated against the plaintiffs because they were citizens of foreign countries, principally Israel, and in doing so violated the Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, 5 U.S.T. 550, T.I.A.S. 2948, and the Convention of Establishment Between the U.S. and France, 11 U.S.T. 2398, T.I.A.S. 4625, and in doing so denied plaintiffs due process and equal protection of the law.

5. Whether the Illinois Supreme Court unconstitutionally violated rules established by this Court pertaining to the doctrine of *forum non conveniens,* in *unconditionally* dismissing the plaintiffs' suit, particularly the rule that an alternative, viable forum must be properly pleaded, and that a court may not *unconditionally* dismiss a suit

based upon the existence of mere *"potential forums";* and in doing so the Illinois Supreme Court, as an arm of the State of Illinois, violated provisions of the Fourteenth Amendment of the Constitution of the United States, and discriminated against the plaintiffs because they were aliens and thereby denied them due process and equal protection of the laws.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1 of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive *any person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the *equal protection of the laws.* (Italics supplied)

TREATY PROVISIONS INVOLVED

The Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, 5 U.S.T. 550, T.I.A.S 2948, provides in part:

ARTICLE V

1. *Nationals* and companies of either Party shall be accorded national treatment and most-favored-nation treatment *with respect to access to the courts of justice* and to administrative tribunals and agencies *within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.* (Italics supplied).

The Treaty of Establishment between the U.S. and France, 11 U.S.T. 2398, T.I.A.S. 4625, containing similar provisions.

Article 1(2) of the Warsaw Convention:

> For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Article 17 of the Warsaw Convention:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 28(1) of the Warsaw Convention in the French text, as officially adopted by the United States of America:

> (1) L'action en responsabilité devra être portée au chois demandeur, dans le territoire d'une des Hautes

> Parties Contractantes soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du ou il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination. (Shawcross, App. A, Pt. II, Issue O.)

Article 28(1) as it appears in the Statutes at Large, 49 Stat. 3000 *et seq.*:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

FEDERAL QUESTIONS PRESENTED

This case involves:

A. The interpretation and application of the Convention for Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention (49 Stat. 3000 *et seq.*).

B. The interpretation and application of the Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, 5 U.S.T. 550, T.I.A.S. 2948, and the Convention of Establishment Between the U.S. and France, 11 U.S.T. 2398, T.I.A.S. 4625.

C. The interpretation and application of Article VI, Clause 2 of the Constitution of the United States.

D. The interpretation and application of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

All of the plaintiffs or their decedents were passengers aboard an Air France aircraft scheduled as Flight No. 139 between Athens, Greece and Paris, France on June 27, 1976. Shortly after takeoff from Athens, the aircraft was hijacked by four terrorists and ordered to be flown to Benghazi, Libya for refueling and then to Entebbe, Uganda, after which such passengers were imprisoned in Uganda.

By their suits, plaintiffs sought justice in the Circuit Court of Cook County, Illinois where all three defendants, Air France, Singapore Airlines and Gulf Air, carry on business on a regular and substantial basis and were subject to the jurisdiction of that Court. Agents of each of the defendant airlines were personally served with summons in Cook County, Illinois. Suit could not be filed in federal court by the plaintiffs because requisite diversity of citizenship is lacking. Aliens may not sue aliens in the Federal Courts of the United States. Plaintiffs had to sue defendants in state court because all three defendants are aliens, i.e., foreign corporations in the sense that they were incorporated and carry on their principal places of business in other countries. Plaintiffs alleged that the reasons they brought suit in the Circuit Court of Cook County were: that coincidentally, but significantly, all three defendants carried on substantial business in Chicago, Illinois and were subject to *in personam* jurisdiction; that the discovery rules of the Circuit Court of Cook County would enable all parties to obtain economical, expeditious and effective redress in one court; that the carrying out of the litigation before one court was required if justice were to be rendered; that otherwise, if plaintiffs were compelled to file their suits against different defendants in different courts in different countries with different languages and different rules, plaintiffs would be effectively and realistically deprived of justice; that there was no "World Court" where plaintiffs could seek effective redress; that this case involved international transitory tort litigation; that the courts of Illinois were uniquely situated in that Air France, Singapore Airlines and Gulf Airlines were subject to *in personam* jurisdiction in Cook County, and that the courts of Illinois had an obligation to the plaintiffs, although aliens and principally citizens of Israel, both constitutionally and by virtue of "treaties of friendship" to hear and resolve their claims and to permit the same access to such courts as would be granted to citizens of Illinois, and not to discriminate against the plaintiffs because they were aliens; that there was no other "convenient court" which would have jurisdiction of all defendant airlines which could provide justice and effective redress as to all parties; that the facts pertaining to the case would have to be proved by multiple depositions herein taken in Singapore, Abu Dhabi, Bahrain, Tel Aviv, Athens, Paris, London, Canada, the United States and other places throughout the world; that such depositions could be taken economically and expeditiously, if taken pursuant to the laws of one court, namely, the Circuit Court of Cook County; that judicial efficiency, as well as economy of the litigation, dictated that one set of depositions constitute the discovery and proof; that because the State Court of Illinois had such jurisdiction of all defendants, and because there was not requisite diversity of citizenship, plaintiffs had no choice but to bring this action against the three air carriers upon whose aircraft the four hijackers were passengers, in the State Court of Illinois; that there was no court anywhere in the world which could issue subpoenas compelling wit-

nesses from such far-flung places of the world to come into such court; that plaintiffs had the legal right to bring their suit in the State Court of Illinois; that the courts of the State of Illinois had the duty to hear and resolve this suit and the duty not to deny to plaintiffs due process and equal protection of the laws merely because they were aliens.

Plaintiffs are, for the most part, Israeli citizens and persons with Jewish names.

They alleged that they were passengers on the Air France jetliner, Flight 139, which was hijacked shortly after noon on Sunday, June 27, 1976.

On Sunday, June 27, at 11:35 A.M., Flight 139 from Tel Aviv to Paris, with a scheduled stop at Athens, touched down at Athens Airport without incident. This flight was due at Paris at 2:35 P.M.

Singapore Airlines Flight 763 from Bahrain had landed at Athens at about 6:45 A.M. on this same Sunday. Among those passengers who disembarked from the Singapore Airlines jetliner were four passengers who later boarded Air France Flight 139. These were the hijackers.

Previously these hijackers had arrived in Bahrain aboard commercial jetliners operated by the third defendant, Gulf Airlines.

All four hijackers had been permitted to board the Gulf Air aircraft enroute to Bahrain, the Singapore Airlines aircraft enroute from Bahrain to Athens, and the Air France aircraft enroute from Athens to Paris, while carrying revolvers, hand grenades, dynamite and other lethal weapons.

The plaintiffs alleged the violation by all three airlines of nondelegable duties to see to it that security precautions were carried out to prevent passengers from boarding their respective jetliners while carrying such weapons, which were easily detectable by the use of routine security measures. Air France was also charged with negligence in respect to its duties to plaintiffs, including the conduct of its flight after takeoff, in failing to keep the cockpit doors locked and in otherwise failing to exercise necessary security precautions during the operation of Flight 139.

At 12:25 P.M., Air France Flight 139 was airborne out of Athens. Eight minutes later, at 12:33 P.M., the four hijackers stood up. One was clutching a revolver in one hand and a grenade in the other. Two of the hijackers placed canisters by the emergency exits.

The aircraft was hijacked and flown to Benghazi, Libya, where it was parked on a remote runway for six hours and took on forty-two tons of fuel. Thereafter, at 9:35 P.M. on the same Sunday, the aircraft took off from Benghazi. The aircraft then was flown for five more hours into East Africa.

On Monday, June 28, 1976, at 3:15 A.M. the Air France aircraft landed at Entebbe Airport, in Uganda. The passengers were kept on the plane for about six hours. Then they were packed into the Old Terminal, a long disused building.

Thereafter, Idi Amin, the President of Uganda, stood in the doorway of the Old Terminal. What thereafter occurred is chillingly reminiscent of the holocaust of World War II that claimed millions of Jewish lives.

One of the hijackers, Wilfried Bose, commenced the process of selection and separation of passengers with Jewish names from those who did not have Jewish names.

After the first few names were called out, there was no question but that he and the other terrorists were employing the same method of selection which had been carried out at Auschwitz. Some of the plaintiffs herein have first-hand knowledge of the Nazi gas chambers, mass graves, ovens, and the Third Reich's concept of "selection."

Approximately 100 Jewish passengers were held as prisoners and hostages for blackmail.

The other approximately 150 passengers who did not have Jewish names were released unharmed and were flown to France.

The hijackers demanded the release of terrorist prisoners in Israel in return for the lives of the hostages. Thursday, July 1, at 1:00 P.M. Israeli time, was the initially set deadline at which the Entebbe terrorists' ultimatum would expire. If the terrorist prisoners in Israel were not released, the Jewish passengers, who were imprisoned in Entebbe, were to be murdered. The deadline was extended.

Meanwhile a rescue mission, carried out by Israeli commandos, known as Operation Thunderbolt, culminated in the rescue of 104 passengers on July 4, 1976, coincidentally the 200th anniversary of the Declaration of Independence.

During their imprisonment, some plaintiffs were tortured and otherwise abused for a period of seven days. Four passengers were killed. Others were seriously injured. Some suffered serious psychic sequellae, particularly those who had previously been subjected to imprisonment or torture in Nazi concentration camps.

Commandos from Israel carried out the unprecedented military operation, Operation Thunderbolt, thereby probably preventing another holocaust, and possibly World War III, when no other government had the courage to confront Idi Amin, the President for Life of the "Republic

of Uganda," although for the first time, a nation and its leader became the protector, and even the spokesman, for international anti-Semitic terrorists.*

Proceedings in the Courts Below

The Circuit Court of Cook County

Air France first *generally* appeared in this suit. Thereafter it filed its Motion to Dismiss, based upon Article 28(1) of the Warsaw Convention and based upon the doctrine of *forum non conveniens.*

Singapore Airlines filed a Motion to Dismiss based upon the doctrine of *forum non conveniens.*

On June 14, 1977, the Circuit Court stayed discovery, pending resolution of the motions to dismiss. Thereafter, an important witness, Henry Kyemba, former Minister of Health of the Uganda Government, defected from Uganda and sought asylum in London, England, where he went into hiding for reasons of security for himself and his family. He had knowledge concerning the death of one of the passengers, Dora Bloch. Plaintiffs requested that the stay order be vacated so as to permit plaintiffs to take the

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* Plaintiffs review the facts because one of the issues is whether the plaintiffs retained the status of "passengers" within the meaning of the Warsaw Convention after the hijacking occurred, and during the period while they were imprisoned for seven days in Uganda. It is the position of the plaintiffs that Air France is precluded from contending that they retained their passenger status because Air France, in *other litigation in France* against Air France has taken the opposite position, i.e., that the claims of other Jewish passengers on *this same aircraft* who were also segregated and imprisoned did *not* arise out of an accident within the meaning of the Warsaw Convention.

deposition of Kyemba in London, England. The Circuit Court modified its prior order accordingly. The evidence deposition of Mr. Kyemba was taken in London on July 28, 1977.

The third defendant, Gulf Air, also known as Gulf Airlines, also filed a motion to dismiss which is pending in the Circuit Court of Cook County. By agreement of the parties, this motion has been held in abeyance pending the outcome of the appeal to the Illinois Supreme Court and this Petition for certiorari to this Court.

The Ruling of the Circuit Court of Cook County

On March 16, 1978, the Honorable Louis J. Giliberto, Judge of the Circuit Court of Cook County, denied the motions to dismiss of Air France and Singapore Airlines, holding, in substance, that Article 28(1) does not involve subject matter jurisdiction and that Air France had waived any jurisdictional defense under Article 28(1) by reason of its having generally appeared in the State Courts of Illinois that the Warsaw Convention was adopted by the United States in its French text; that the history of the Warsaw Convention demonstrates that the word "domicile" appearing in Article 28(1) was never intended to mean *solely* the country of incorporation of an incorporated air carrier; that the word "domicile" in Article 28 (1) was never intended to be given the restrictive meaning given to that word in opinions of various United States courts in which opinions relate primarily to tax and corporate litigation; that in addition an affidavit of a French language expert was filed on behalf of plaintiffs, which stated that the word "domicile" in the French text of Article 28(1) means those places within countries where the air carrier regularly carries on business on a substantial basis; that that affidavit was *not* contradicted by Air France; that Air France was "domiciled" in the United States of America and in the State of Illinois within the meaning of Article 28(1); that the basis for the bringing of suit by plaintiffs in the State Court of Illinois was because Air France, Singapore Airlines and Gulf Airlines carried on business activities in the State of Illinois; that *none* of the defendants *properly pleaded any viable alternative forum anywhere* in any country where effective redress could be obtained by the plaintiffs; that despite inquiry by Judge Giliberto in open court, *the defendants would not agree upon any alternative forum anywhere in the world where all of them would consent to jurisdiction*; that the fact that plaintiffs were aliens did not permit discriminatory treatment of the plaintiffs; that contrariwise, the State Courts of Illinois had an obligation to grant to the plaintiffs the same access to the courts of Illinois which the courts would grant to Illinois citizens; that if the courts of Illinois did otherwise, the courts of Illinois would be violating the rights of the plaintiffs to equal protection and due process; that if the courts of Illinois dismissed this suit, they realistically would be denying to the plaintiffs due process and equal protection of the laws; that to force plaintiffs to sue different defendants in different courts of different nations with different rules and different languages would be violating the duty of the State Court of Illinois to grant equal access to the plaintiffs to the courts of Illinois, that is, access equal to that of United States citizens; that if Article 28(1) were to be construed so as to deny to the plaintiffs the right to sue Air France in the State of Illinois, even though Air France carries on business in the State of Illinois on a regular and substantial basis, that would be tantamount to the denial

to the plaintiffs of due process and equal protection; that there is no "World Court" which has jurisdiction of this type of suit; that the courts of civilized nations (in this instance the Circuit Court of Cook County) had the obligation to the plaintiffs as well as to the defendants to hear and resolve this case; that the doctrine of *forum non conveniens* was inapplicable because of the failure of the defendants to plead or agree upon any viable alternative forum, where all defendants would be subject to jurisdiction in a single court.

The Appellate Court of Illinois and the Supreme Court of Illinois

Air France filed an original petition for the issuance of Writs of Mandamus and Prohibition to the Circuit Court of Cook County to order that Court to grant defendant's motion to dismiss and to prohibit it from continuing to exercise and to assume jurisdiction over this suit because Air France contended that the provisions of Article 28(1) of the Warsaw Convention prohibited maintenance of the suit in any court of the United States, and because of the principles of *forum non conveniens*.

Singapore Airlines appealed to the Appellate Court of Illinois. This appeal was transferred to the Illinois Supreme Court.

Discovery was stayed during the appeals to the Illinois Supreme Court. Plaintiffs were prohibited from taking any depositions or otherwise proceeding with normal pretrial procedures.

The Illinois Supreme Court granted leave to Air France to file its original petition for a writ of mandamus and prohibition on March 30, 1978. On June 28, 1978 the Illinois Supreme Court heard oral arguments.

On December 4, 1978, the Illinois Supreme Court rendered its opinion by which the order of the Circuit Court denying the motions of Air France and Singapore to dismiss was vacated and the cause was remanded to the Circuit Court of Cook County with directions to dismiss the action as to Air France and Singapore.

REASONS FOR GRANTING THE WRIT

I.

The Illinois Supreme Court Misinterpreted Article 17 of the Warsaw Convention and Failed to Comply With Well-Established Law Pertaining to Judicial Admissions.

The Illinois Supreme Court refused to permit the Circuit Court of Cook County to hear the case. In doing so it misinterpreted and misapplied the Warsaw Convention, discriminated against and denied due process and equal protection to the plaintiffs, because they were aliens, and in doing so, violated the Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, 5 U.S.T. 550, T.I.A.S. 2948 and the Convention of Establishment Between the U.S. and France, 11 U.S.T. 2398, T.I.A.S. 4625.

The Supreme Court of the United States has not seen fit to grant certiorari in any case involving the Warsaw Convention, although this treaty is a half century old and decisions construing it are in irreconcilable conflict. This treaty purports not only to limit damages recoverable against negligent airlines for injury or death, regardless of the extent of the injuries or damages (approximately $10,000), unless wilful misconduct is shown, but also to restrict the rights of innocent passengers as to where they may file their suits against their negligent air carriers.

In this case, the plaintiffs have been subjected to unconstitutional discriminatory treatment, and, in addition, to violations of their treaty rights, pursuant to Treaties of Friendship with France and Israel.

This case supplies an excellent vehicle for review by this Court because much lip service is paid to the preservation of civil and human rights. The essence of the problem which confronts plaintiffs in this type of litigation is that no "World Court" has been created to meet the societal need for a court which will have jurisdiction to resolve this type of transitory tort litigation.

Geoffrey C. Hazard, Professor of Law, Yale Law School, in *Requisites of a Valid Judgment,* (24 Practical Lawyer 35, 40 (April 15, 1978)) states: "Governments share the purpose of assuring that a party with a valid legal claim can find some forum in which to obtain effective redress. Failure to provide legal remedies for wholly domestic disputes can lead to civic demoralization and disturbance of the peace through resort to self-help; the same can happen concerning disputes whose incidents occur *in the territory of more than one government.* Broadly speaking, *it is therefore a concern of every government to provide a forum for redress if no better forum can be found,* i.e. a forum of last resort." (Italics added)

Air France took the position *in this suit* that there was no question but that *all* the claims of *all* the plaintiffs were the result of an "accident" within the meaning of Article 17 of the Warsaw Convention and that plaintiffs were and remained "passengers" of Air France *at all times,* including the seven-day period while they were imprisoned in Entebbe, Uganda.

In another suit instituted against Air France in France by two other *passengers on the same plane as the plaintiffs herein,* Air France took the position that *those passengers* were *not* entitled to recover anything from Air France based upon either the Warsaw Convention or the Hague Protocol because their claims did *not* arise out of an "accident" within the meaning of Article 17 of the Warsaw Convention. The title of that case is *Haddad* v. *Air France,* Tribunal de Instance, Paris, Index No. 4.241/77.

Plaintiffs were unaware of this diametrically opposite position of Air France until after Air France filed its Petition for Writs of Mandamus and Prohibition. Plaintiffs filed authenticated English translations of such French court pleadings with the Illinois Supreme Court.

The Haddads alleged substantially the same *factual* allegations as the plaintiffs in the case at bar, namely that they, after the airplane landed in Entebbe, "were made the object of discrimination because of their Jewish origin or their Israeli nationality, and were only liberated by an Israeli military intervention (Operation Thunderbolt) during the July 3/4 1976 night."

The opinion of the French court unequivocally stated that the *primary* defense of Air France is that the provisions of the Warsaw Convention or Hague Protocol do *not* apply to the claims of those plaintiffs. The Court's opinion points out "that the company (Air France) replies *first* that Article 17 applies only when the damage is caused by an accident *and maintains that the notion of accident couldn't be extended to an act of air piracy.*"

The legal significance of the French case to this litigation, however, is not *how* the French lower court ruled. It is that Air France took a position and made a judicial admission in the courts of France which is the exact op-

posite of its pleadings *and affidavits* filed in the Circuit Court of Cook County and in the Illinois Supreme Court.

Article 28(2) of the Warsaw Convention requires the Illinois Courts to apply Illinois procedural law.

The Illinois Supreme Court failed to apply its own law to this case.

The Illinois Supreme Court *did not even refer in its opinion* to the salient, uncontroverted fact that the record in this suit, supported by sworn affidavits, showed that Air France had pleaded an exact opposite position to that which it took in the courts of Illinois.

Under Illinois law, pleadings are designed to put an opposite party on notice as to the issues involved and to *in good faith* state the pleader's position. *Breslin* v. *National Surety Co.*, 114 F. 2d 65, 68 (3rd Cir. 1930); *Van Straten* v. *Continental Ill. Nat. Bank & Trust Co.*, 8 Ill.App.2d 100, 130 N.E.2d 224 (1955). Where statements in pleadings are not expressed in the alternative, they must be considered as *admissions* of *such pleader* in cases concerning the subject matter, even if parties are not the same. *Wells* v. *Web Machinery Company*, 20 Ill.App.3d 545, 315 N.E. 2d 301 (1974).

The pleadings by Air France filed in France in *Haddad* v. *Air France* "fall precisely within the judicial admission category • • • because they were neither amended nor withdrawn • • •" *Wells* v. *Web Machinery Company*, 20 Ill. App. 3d 545, 315 N.E. 2d 301 (1974), at 312. See also *Alan Wood Steel Co.* v. *Capital Equip. Enter. Inc.*, 39 Ill. App.3d 48, 349 N.E.2d 627 (1976), which held that a pleading in another similar cause of action constitutes an admission against the pleader.

Apart from such judicial admissions which bind Air France as a matter of law, the Illinois Supreme Court misinterpreted Article 17 of the Warsaw Convention.

The obvious "strategy" of Air France was to induce the Supreme Court of Illinois to find that plaintiffs *herein* were *at all times* passengers within the meaning of the Warsaw Convention, and, therefore, their suit should be dismissed by reason of Article 28(1), which it contended precludes the bringing of this suit in the Circuit Court of Cook County.

The basis of the motion of Air France was that all of the plaintiffs are aliens; that none of the plaintiffs purchased their tickets in the United States; that none of the tickets issued to the plaintiffs included an agreed stopping place or ultimate destination in the United States; that Air France is not "domiciled" in the United States (equating erroneously, as hereinafter shown, that the word "domicile" means solely the nation of incorporation of an air carrier) and finally because the principal place of business of Air France is in France.

Air France's ploy was to get the cases of the plaintiffs, including Israeli plaintiffs, into France where it will contend the opposite of what it pleaded in the Illinois courts. Air France pleaded in the French courts that plaintiffs were *not* passengers whose claims arose out of an "accident" within the meaning of Article 17, and that plaintiffs should get nothing.

The Illinois Supreme Court cited various decisions, including *Husserl* v. *Swiss Air Transport Co.*, 388 F.Supp. 1238, 1245-46 (S.D.N.Y. 1975); *MacDonald* v. *Air Canada*, 439 F.2d 1042 (1st Cir. 1971); *Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S.

950, 51 L. Ed. 2d 800, 997 S. Ct. 1592 (1977); *Maugnie* v. *Compagnie Nationale Air France,* 549 F.2d 1256 (9th Cir. 1977), *cert. denied,* 431 U.S. 974, 53 L. Ed. 2d 1072, 97 S. Ct. 2939 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33, 37-38 (2d Cir. 1975), *cert. denied,* 429 U.S. 890, 50 L. Ed. 2d 172, 97 S. Ct. 246 (1976); *Karfunkel* v. *Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D. N.Y. 1977), as authority for its ruling that plaintiffs retained the status of passengers in the sense that their claims were governed by the Warsaw Convention, pursuant to Article 17.

The facts in this case are materially different from the facts in any of the decisions cited by the Illinois Supreme Court. This case involves the segregation of passengers on the basis of their ethnic origin and their subsequent imprisonment for one week in Entebbe, Uganda.

In any event, the Illinois court's ruling concerning Article 17 of the Warsaw Convention violated Article 28(2) which requires the forum to apply its own procedural laws. Under Illinois law, Air France was and is precluded and estopped from attempting to have the Illinois courts apply Article 17 differently than the position unequivocally taken by Air France in the courts of France.

II.

Article 28 of the Warsaw Convention Was Misinterpreted and Misapplied by the Illinois Supreme Court.

A. Article 28(1) Refers to Treaty Jurisdiction which is Waived by the Filing of a General Appearance.

Assuming, however, that all of the claims of all of the plaintiffs are governed by the Warsaw Convention as to their air carrier, Air France, the court below again failed to comply with its own law pertaining to the effect

of general appearances, and thereby again discriminated against plaintiffs.

Article 28(2) of the Warsaw Convention provides:

> (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Air France waived any jurisdictional defense by generally appearing in the State Court of Illinois, except "subject matter" jurisdiction.

Air France concedes this but contends that Article 28(1) involves subject matter jurisdiction.

Plaintiffs have never disputed that subject matter jurisdiction cannot be waived.

The issue, therefore, is whether Article 28(1) involves subject matter jurisdiction.

The decision of the Supreme Court of Illinois clearly is the exact opposite of the position which has been taken by the Justice Department of the United States in reference to whether Article 28(1) involves subject matter jurisdiction.

The Justice Department of the United States has taken the position that Article 28(1) does not involve subject matter jurisdiction, and is waived by any air carrier which generally appears in a court which would have *in personam* jurisdiction and subject matter jurisdiction, except for Article 28(1).

If the Justice Department's interpretation is correct, that of the Illinois Supreme Court is wrong; and Air France, by generally appearing in a court of general jurisdiction, waived any jurisdictional defense under Article 28(1).

It is the long-settled law of Illinois that any action taken by the litigant which recognizes the case as in Court will amount to a general appearance. *McNelly* v. *McNelly,* 38 Ill. App.3d 637, 348 N.E. 2d 500 (1976).

Under Illinois law Air France was required to object to the "jurisdiction of the court over the person" of such defendant as to these particular cases by filing a Special Appearance *accompanied by affidavits.* The statute (Ill. Rev. Stat. Ch. 110 §20) is specific in stating that, "A special appearance may be made as to an entire proceeding *or as to any cause of action involved therein.* Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance."

Ill. Rev. Stat. Ch. 110 §20 also states: "If the reasons for objection are not apparent from the papers on file in the case, *the special appearance shall be supported by affidavit setting forth the reasons.*"

The United States of America and its taxpayers have a vital interest in a realistic construction of Article 28(1), pertaining to jurisdiction, because, otherwise, the United States of America and its taxpayers may be forced to pay substantial damages in litigation arising out of international commercial aircraft disasters, merely because Article 28(1) purports to forbid suits against international air carriers to be brought in the United States, even though concededly they carry on substantial business in the United States.

Suits were brought on behalf of over 1,000 *alien* heirs of over three hundred deceased *alien* passengers against various defendants, including Turkish Airlines, an alien corporation, in the United States District Court in Los

Angeles, arising out of the crash of a McDonnell Douglas DC 10 jetliner which occurred in Paris, France. See Report to the Multi-District Litigation Panel of Federal Court, *In Re Paris,* M.D.L. No. 172, dated April 28, 1978. Most of the passengers were aliens from thirty-six different countries. *In Re Paris Aircrash,* 399 F. Supp. 732; 69 F.R.D. 310 (1975).

Turkish Airlines, an alien defendant, after *first* generally appearing, by filing a hull damage suit in the Federal Court in California *thereafter* filed the *same* Article 28(1) motion to dismiss that Air France filed herein in the Circuit Court of Cook County, and raised precisely the same contentions regarding jurisdiction as to the alien plaintiffs in that litigation that Air France asserts in the suit at bar. Turkish Airlines does not fly into the United States and does not carry on business on a regular and substantial basis in the United States, as does Air France. Turkish Airlines had a much stronger basis for asserting an Article 28(1) defense as to the alien plaintiffs in that litigation than Air France has in the suit at bar.

The legal issue as to the waivability of Article 28(1) by the filing of a general appearance, presented to the Supreme Court of Illinois, therefore, was the same issue argued and presented to the Federal Court in Los Angeles.

The Justice Department of the United States took the position in that litigation that a jurisdictional defense based on Article 28(1) of the Warsaw Convention does not involve true subject matter jurisdiction and such a defense is waivable; that Turkish Airlines by filing a hull suit in the Federal Court in California had *generally* appeared in that court *before* filing its Motion to Dismiss based upon Article 28(1), and that, therefore, Turkish

Airlines had waived any defense as to jurisdiction under Article 28(1).

This Court is well aware that in cases involving foreign defendants, as well as the United States of America, especially of the magnitude of that Paris aircrash litigation, the position of the Justice Department of the United States is taken only after careful review and consideration.

There is no case which has held that an international air carrier may not waive Article 28 by generally appearing in a Court which would otherwise have jurisdiction.

Turkish Airlines paid multi-millions of dollars in settlements, all of which were specifically approved by orders of the Federal Court in California.

The orders approving settlements, entered by the United States District Court stated on their face that they applied specifically to such alien airline, and were signed and approved by counsel for Turkish Airlines.

Business Insurance, May 28, 1978, which reviewed the report issued by United States District Court Judge Pierson M. Hall to the Multi District Panel of the United States District Courts stated: "An exact total of $62,268,750 in settlements has been paid to 1,123 claimants *worldwide* from the lawsuits in United States District Court here [Los Angeles] for the deaths of 340 persons in the 1974 crash of a *Turkish Airlines DC10 near Paris.*"

It is inane to contend United States District Court Judge Pierson M. Hall, one of the most experienced judges in this country concerning international aviation litigation, would sign numerous orders approving settlements involving the claims of *alien* plaintiffs against Turkish Airlines, which previously had filed Motions to Dismiss based on

Article 28, if the Court considered that there was any doubt whatever but that it had both *in personam and subject matter jurisdiction* of the claims of all plaintiffs, *including the numerous alien plaintiffs,* against Turkish Airlines, including those claims as to which such airline had previously filed motions to dismiss based upon Article 28(1) of the Warsaw Convention.

Otherwise the orders would be a complete nullity as to both such plaintiffs and the airline, and would provide no protection to the airline or its insurers.

The Turkish Airlines case involved precisely the same legal issue as is involved in the case at bar: (a) alien passengers, who purchased their tickets in various foreign countries; (b) their tickets did not provide for ultimate destinations in the United States; (c) the principal place of business of Turkish Airlines is Turkey; (d) Turkish Airlines was incorporated in Turkey.

In the case at bar, the Article 28(1) defense of Air France raised as to the plaintiffs herein is exactly the same as that raised by Turkish Airlines as to the alien plaintiffs in that case.

The United States Justice Department in the Turkish Airlines case emphasized the distinction between genuine subject matter jurisdiction, which involves *the power of a court* to hear the *type* of case which has been filed, and "treaty jurisdiction" (the phrase coined in *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798 (2d Cir. 1971)).

The Justice Department of the United States of America took the unequivocal position that the United States District Court in Los Angeles had jurisdiction of *both* the subject matter and the person of Turkish Airlines, and that such foreign air carrier, by generally appearing in

such court before filing its motion to dismiss based upon Article 28 of the Warsaw Convention, waived any objections to the jurisdiction of such Court to hear and resolve those suits as to such foreign airline. The Justice Department's position as to the meaning of Article 28(1) is the opposite of that of the Illinois Supreme Court:

> While referring to jurisdiction the Warsaw Convention does *not* speak of "subject matter jurisdiction" and the provisions of Article 28(1) can be, and have been, *waived by THY (Turkish Airlines)*. • • •
>
> Defendant THY, in its Memorandum on Jurisdictional Issues, relies heavily on the decision of the Court in *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2nd Cir., 1971). THY derives from its reading of *Smith* the proposition that since ". . . none of the places specified in Article 28(1) of the Warsaw Convention is in the United States, the courts of the United States lack subject matter jurisdiction of an action for damages subject to the provisions of the Warsaw Convention." Memorandum of THY, A.O. of Jurisdiction page 43. *Yet even in the excerpt chosen by THY the Smith court speaks not of "subject matter jurisdiction," but of "treaty jurisdiction".* • • •
>
> The defendant THY does not, and in fact cannot show that "treaty jurisdiction" is equivalent to "subject matter jurisdiction." • • •
>
> The *Smith* case does *not* equate treaty jurisdiction and subject matter jurisdiction. • • •
>
> Without the limiting aspects of Article 28(1), this Court undoubtedly would have jurisdiction in this action.
>
> *The United States believes* that under certain circumstances the air carrier can, after the damage occurs, waive the limitations in Article 28, which should not be construed as restricted to "subject matter jurisdiction" as used in the Federal Rules of Civil Procedure. The United States believes that in this case THY (Turkish Airlines) has waived the provisions of Article 28. (Italics supplied)

Brief for Justice Dept., *In re: Paris Aircrash*, 399 F.Supp. 732 (1975).

Plaintiffs filed the entire brief of the Justice Department in the case at bar, and quoted from it in their Briefs filed in the Circuit Court and in the Illinois Supreme Court.

The Illinois Supreme Court did not refer to the contrary position of the Justice Department.

It would seem clear that this treatment of plaintiffs herein was hardly consonant with the Treaties of Friendship between the United States and Israel and France, which require equal access and consequent equal treatment of citizens of Israel and France.

The opinion of the Supreme Court of Illinois is diametrically opposite the position of the Justice Department of the United States concerning Article 28(1) of the Warsaw Convention.

In the Turkish Airlines litigation, if Article 28(1) were construed the way the Supreme Court of Illinois construed it, as involving "subject matter jurisdiction" in the legal sense of nonwaivability, the practical effect of such a holding would be to compel the United States of America to pay *all* damages of plaintiffs in a great many cases involving international air crashes.

In addition to the position of the Justice Department, a United States aircraft manufacturer, McDonnell Douglas Corporation, also a defendant in the Paris Aircrash cases, took the same position as the Justice Department, namely, that Article 28 does not involve subject matter jurisdiction and that an airline which generally appears in a court otherwise having jurisdiction is precluded from

thereafter raising a defense as to jurisdiction based upon Article 28 of the Warsaw Convention. Its brief stated:

> Contrary to THY's (Turkish Airlines) assertion that the court in *Smith* found Article 28(1) related to "subject matter jurisdiction," the Second Circuit carefully avoided such a holding. After noting that prior cases had "divided about evenly into decisions that view Article 28(1) as a clause dealing with subject matter jurisdiction and those that characterize it as a venue provision," 452 F.2d at 800 and n. 5, the decision does not again refer to "subject matter jurisdiction."
>
> Instead, it concludes Article 28(1) relates to "treaty jurisdiction," which it treats as separate from "domestic jurisdiction and venue questions." *Id.* at 802. The opinion does find that Article 28(1) goes to the court's "basic jurisdiction," but never implies that all concepts attendant to "subject matter jurisdiction" apply to "treaty jurisdiction" as well. In particular *Smith* decided nothing about the waivability of Article 28(1).
>
> • • •
>
> To characterize Article 28(1) as "subject matter jurisdiction" *is to apply a term with a conceptual basis and history entirely different from the Warsaw Convention.*

Brief for McDonnell Douglas, *In re*: *Paris Aircrash*, 399 F.Supp. 732 (1975).

The *Smith* court recognized that decisions as to whether Article 28(1) involve subject matter jurisdiction or venue are about evenly divided.

Clarification of this issue by this Court is required not only from the standpoint of passengers but also the federal government and the thousands of United States manufacturers of aircraft and their component parts.

There are innumerable cases in which the United States of America and its taxpayers (as well as in many instances

United States aircraft manufacturers) could be required to pay *all* damages in respect to international air accidents, even though their negligence might be minimal compared to that of the commercial international airline upon whose aircraft the plaintiffs were injured or killed.

Suppose 300 United States lawyers attend a convention in England. While in England, due to bad weather, they decide to fly to Paris for a few days. They purchase new tickets in *England* to fly aboard an Air France DC 10 airplane from England to Paris and back to England. They are killed enroute from England to Paris. Their families institute suit against Air France in a court in a jurisdiction in the United States where Air France carries on substantial business. The United States of America is also named as defendant.

Air France is charged with wilful misconduct in flying an aircraft with a known serious structural defect which caused the plane to disintegrate during normal flight.

The United States of America is charged with negligence in improperly certifying the aircraft when it knew or should have known of the structural defect.

The residences of the plaintiffs have nothing to do with Article 28(1). Air France under the authority of the opinion of the Illinois Supreme Court in the case at bar would contend exactly the same as it contends in the case at bar, namely that the plaintiffs could not sue Air France in the United States because of Article 28(1) because: (a) the plaintiffs did not purchase their tickets in the United States, for the London-Paris-London flights; (b) their ticketed destination was England; (c) the principal place of business of Air France is in France; and (d) Air France has its "sole domicile" in France.

Air France would contend that this Court, by denying the Petition for Certiorari, if this Court does so without comment, acquiesced in the ruling of the Illinois Supreme Court.

The decision of the Illinois Supreme Court is important. Its importance even transcends the rights of the plaintiffs, although their rights alone should be sufficient to warrant correction of the opinion of the Illinois Supreme Court.

The above example involving the 300 United States citizens demonstrates this. Presumably Air France would be dismissed as a defendant because of Article 28(1), pursuant to the decision of the Illinois Supreme Court.

Therefore, the United States of America would remain as the *sole defendant* in the federal court of the United States. Despite the fact that the accident occurred either in France or in England, the United States could be held liable because its negligent conduct in respect to certification occurred in the United States.

If the United States of America were held 20% at fault and if the *absent defendant,* Air France, were held 80% at fault (equivalent to wilful misconduct) and if the families of the 300 American deceased lawyers-passengers recovered an average of $500,000 each, *the United States taxpayers would be required to pay* $150,000,000. Plaintiffs would have the legal right to collect *all* damages from the federal government.

Air France, although decreed 80% negligent, would pay nothing. See, e.g., *American Motorcycle Ass'n* v. *Superior Ct.,* 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

It would be wholly unattuned to reality to expect the families of the American passengers to sue Air France

in England or France when they would have the right to collect the *full amount of their damages* (one hundred and fifty million dollars) from the federal government.

On the other hand, assume that in the above example, McDonnell-Douglas and Air France were sued in the United States; that Air France was dismissed as a defendant because of Article 28(1); that McDonnell Douglas, therefore, remained as the sole defendant in the United States; that McDonnell Douglas was held liable by a court of the United States, even though the court ruled that the negligence of McDonnell Douglas was minimal in comparison to that of Air France; that the total damages of the families of the 300 American lawyers were 150 million dollars.

Who would pay?

McDonnell Douglas would pay one hundred and fifty million dollars.

Air France would not pay.

We have previously shown that McDonnell Douglas in other litigation which involved precisely the same issue as is involved in the case at bar, namely, whether Article 28(1) involves subject matter jurisdiction, took the same position of that of the Justice Department of the United States.

The bottom line is that the decision of the Illinois Supreme Court in the case at bar not only denied equal protection and due process of the law to the plaintiffs herein, but it purports to establish a precedent which will deny due process of the law and equal protection of the law in the future to (a) the United States of America, (b) United States manufacturers of aircraft, and (c)

thousands of United States makers of component parts of aircraft.

Innumerable other similar examples of the erroneous interpretation of Article 28(1) by the Illinois Supreme Court could be given.

Suppose a Chicago husband and wife, Mr. and Mrs. Jones, are traveling to England with a planned one-day side visit to Paris via Air France. The couple purchase separate tickets from Air France in its Chicago office providing for carriage from Chicago to London to Paris to London to Chicago. They board an Air France flight in Chicago, Illinois for the trip to London. In the middle of their stay in London they plan to take their one-day visit to Paris. When they arrive at the London airport for their Air France flight, Mrs. Jones discovers that she inadvertently left her ticket in her hotel room. She thus purchases a *new* separate ticket at the London airport to fly from London to Paris and return to London. An accident occurs in France on this Air France London-Paris flight and both husband and wife are killed.

As a result, the children file suit against Air France in the Circuit Court of Cook County for damages by reason of the deaths of their parents.

According to Air France, the Circuit Court would have jurisdiction as to Air France concerning the suit for the death of the *husband* because the husband purchased his ticket in Chicago in the United States.

According to Air France, the Circuit Court would not have jurisdiction as to Air France for the death of the *wife,* because the wife purchased a new ticket in London to fly from London to Paris.

Undoubtedly the family of this deceased Chicago couple would be totally unaware that Mrs. Jones purchased a new ticket in London to fly from London to Paris. Naturally, they would assume that Mrs. Jones, as well as her husband, Mr. Jones, had used the same tickets which they purchased before departure in the Chicago Office of Air France, which included the London-Paris flight.

This example again demonstrates the error of the interpretation of Article 28(1) by the Illinois Supreme Court. If the Illinois Supreme Court is correct that Article 28(1) involves "subject matter jurisdiction" which can never be waived, the Jones plaintiffs could go through long and costly litigation and a trial only to have Air France, after five years of litigation and appeals, collaterally attack the judgment for the wrongful death of the wife, Mrs. Jones, simply because she had purchased her ticket in London, and that therefore the Illinois courts did not have "subject matter jurisdiction," and that nothing that Air France did could constitute a waiver regarding jurisdiction.

In Illinois, the investiture of jurisdiction to the circuit courts derives from Article VI, Section 9, of the Illinois Constitution, which grants to circuit courts "original jurisdiction of all justiciable matters," except where the Supreme Court has exclusive and original jurisdiction. Ill. Const. Art. VI, §9 (1970). Under this provision, circuit courts have general jurisdiction over all cases involving personal and property rights including the type of suit at bar. *See* Braden & Cohn, *The Illinois Constitution,* 330 (1969).

The "subject matter jurisdiction" of a court is the power of that court to hear the type of case presently before it. *Faris* v. *Faris,* 35 Ill.2d 305, 309, 220 N.E.2d 210 (1966); *Bush* v. *Hanson,* 70 Ill. 480 (1873). Specifically, it defines the authority of the court to hear "the class of cases to which the particular case in question belongs." *People* v. *Shurtleff,* 353 Ill. 248, 261, 187 N.E.2d 271 (1933); *accord, Standard Industrial Ins. Co.* v. *Industrial Comm'n,* 39 Ill. 2d 172, 233 N.E.2d 362 (1968).

Subject matter jurisdiction may therefore be viewed as the preconceived power of the court to entertain a certain variety of case. As such, it does not address the place of the occurrence or the power over the person, *United Biscuit Co.* v. *Voss Truck Lines,* 407 Ill. 488, 95 N.E.2d 439 (1950), but is conferred to the court by law. *People* v. *Prystalski,* 358 Ill. 198, 192 N.E. 908 (1934); *Oakman* v. *Small,* 282 Ill. 198, 118 N.E. 466 (1918).

The four contacts enumerated in Article 28(1) by their terms do not relate to a present day conception of subject matter jurisdiction. Subject matter jurisdiction "has reference to the nature of the cause of action or the relief sought," 1 Freeman, *Judgments* §337 (1925), and defines "the power [of the court] to deal with the general subject matter involved in the action." 21 C.J.S. §35 (1940).

The relationship of the Circuit Court of Cook County to this litigation consists of "territorial" jurisdiction, which refers to the connection between the territorial authority of the court and the action brought before it (see Hazard, *Requisites of a Valid Judgment,* 24 Practical Lawyer, 35, 39 (1978)), or "treaty" jurisdiction (*Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798 (2nd Cir. 1971)).

This Court has never reviewed a case involving the Warsaw Convention. The case at bar involves many significant issues concerning its construction. Review by this Court of the case at bar will result in clarification of the Warsaw Convention, particularly Article 28(1). Otherwise, manifest injustice will result, not only to innocent victims of international air crash accidents and hijacking, but also to the taxpayers of the United States and to United States aircraft and component part manufacturers.

This world has become a shrinking planet. 4.1 billion people occupy it. They are citizens of over 200 nations, many of which are not adherents to the Warsaw Convention. Nonetheless, the 4.1 billion people on this earth are bound by the Warsaw Convention, depending upon such implausible, unrealistic determinants as where they bought their tickets, or where they are ultimately going to, or where some musty papers of incorporation were filed by an international airline perhaps 50 years ago, or where the principal place of business is of such international airlines.

It would seem that this Court has before it a unique opportunity to do something so that a fifty-year-old treaty no longer destroys the rights of innocent victims, as well as United States taxpayers and United States manufacturers, in respect to subsonic, supersonic and hypersonic travel. The Warsaw Convention even literally applies to outer space travel.

The fact that plaintiffs are aliens (as the Illinois Supreme Court repeatedly emphasized as though their citizenship makes a difference in the way they should be judicially treated) is not only of no consequence, but the Treaties of Friendship between the United States and Israel and France require that plaintiffs be accorded the

same rights as Illinois citizens would have received at the hands of the Illinois court.

The world has been transformed in little more than a generation, catapulted from the horse-and-buggy era to conventional jetliners, and soon to extensive supersonic transports, hypersonic airliners and the space age. The legal profession throughout the world simply has not kept up with these massive changes.

Judges and lawyers have painted themselves into a corner. Society views lawyers as technicians, practicing a rather esoteric craft of small value. Others state that some lawyers are irrelevant, even obsolescent. Certainly the legal profession throughout the world can hardly justify a state of the law in which a computer has to be used to try to figure out whether a treaty is applicable to a particular flight. See Tompkins, *Limitation of Liability of Treaty and Statutes,* 36 J. Air L. & Comm. 421 (1970).

This Court may conclude that the problem is that of the President and the Senate of the United States. It is not. Denunciation of the Warsaw Convention by the United States Senate will not solve the problem. United States citizens would still be bound by the Warsaw Convention, depending upon where they purchased their tickets and their ticketed ultimate destinations.

Article 28(1) has never been construed by this Court as to whether it involves "subject matter jurisdiction." The position taken by the Justice Department of the United States in reference to the meaning of Article 28(1) is the opposite of that taken by the Illinois Supreme Court.

It is respectfully submitted that this Court should grant certiorari on this basis alone to review the opinion of the Illinois Supreme Court.

B. The Circuit Court of Cook County Had Jurisdiction as to Air France By Reason of the Fact That it Carries on Substantial Business on a Regular Basis Within the United States and Within the Jurisdiction of the Forum Court and is, Therefore, "Domiciled" Within the United States Within the Meaning of Article 28 of the Warsaw Convention.

This point is academic if this Court grants certiorari and rules that the Warsaw Convention does not apply to the claims of the plaintiffs or that, if it does apply, Air France waived any defense relating to jurisdiction based upon Article 28(1) by reason of its general appearance in the Circuit Court of Illinois, a court of general jurisdiction.

Assuming, however, that Article 28(1) applies, it is clear that an action may be brought at the option of the plaintiffs in any Court *within any nation* which constitutes one of the places described in Article 28(1). Plaintiffs' choice of forum *within that nation* is governed by the internal law of that country, not by the Warsaw Convention. *Pardonnet* v. *The Flying Tiger Line, Inc.,* 233 F.Supp. 683 (N.D. Ill. 1964); *Pitman* v. *Pan American World Airways, Inc.,* 223 F. Supp. 887 (E.D. Pa. 1963); *Spencer* v. *Northwest Orient Airlines, Inc.,* 201 F.Supp. 504 (S.D. N.Y. 1962); *see* McKenry, *Judicial Jurisdiction Under the Warsaw Convention,* 29 J. Air L. & Com. 205 (1963); Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention,* 9 McGill L. J. 352 (1963).

Article 28 refers to nations as distinguished from states. Therefore, if the United States of America constitutes any of the nations where suit could be brought against Air France within the meaning of Article 28(1), suit properly was brought in Illinois, insofar as jurisdictional questions are concerned, because Cook County, Illinois is one of the

places where Air France concededly carries on business on a regular basis.

The Warsaw Convention was drafted in the French language. The French text is controlling. *Husserl* v. *Swiss Air Transport Company,* 388 F. Supp. 1238 (S.D.N.Y. 1975), held that "this country adhered to the *French* text of the Convention." The Warsaw Convention treaty was adopted by the United States in the French language (49 Stat. 3000). See also *Benjamins* v. *British European Airways,* 572 F.2d 913 (2nd Cir. 1978), which held that the English language translation contained in the Statutes at Large is "unofficial." 572 F.2d 913 (2d Cir. 1978).

Article 28(1) was designed more than a half century ago to prevent suits in courts of nations *where aircraft crashed* because the Courts of such places might have undeveloped judicial systems. D. Goedhuis, *National Airlegislations and the Warsaw Convention,* 286-89 (1937); *Mason* v. *B.O.A.C.,* 5 Av. L. Rep. (CCH) 17,121 (S.D.N.Y. 1956). *See also* Statement of Mr. Clarke of Britain, *Translation of Minutes of Warsaw Convention,* at 187.

The question is what do the words of Article 28(1) "le tribunal du domicile du transporteur," mean as applied to international airlines such as Air France?

Air France contends such words limit suit to the courts of the nation where the airline was formally incorporated, i.e. in the country where its articles of incorporation were filed.

It is the position of the plaintiffs that these words mean the courts of a nation where such an airline is ordinarily resident in the sense of where it regularly and substantially carries on business.

We respectfully submit that the Illinois Supreme Court adopted an erroneous interpretation of Article 28(1), without consideration of the history of the Warsaw Convention or basic rules of construction of a treaty. Furthermore, the interpretation by the Illinois Supreme Court is not consonant with the reality of multinational corporations, including international airlines, and the fact that realistically they are "domiciled" in multiple nations of the world.

The same principles which apply to the construction of a statute govern the interpretation of a treaty. *Sullivan* v. *Kidd,* 254 U.S. 433, 439, 41 S. Ct. 158, 160-161 (1921); *Rocca* v. *Thompson,* 223 U.S. 317, 331-332, 32 S. Ct. 207, 210 (1912); *Board of County Comm'rs* v. *Aerolineas Peruanasa, S. A.* 307 F.2d 802, 806 (5th Cir. 1962), *cert. den.,* 371 U.S. 961, 83 S. Ct. 543 (1963); *Hidalgo County Water Control and Improvement District* v. *Hedrick,* 226 F.2d 1, 7 (5th Cir. 1955), *cert. den.,* 350 U.S. 983, 76 S. Ct. 469 (1956); (looking to the intent of the parties and the purpose to be achieved); *Maximov* v. *United States,* 373 U.S. 49, 54, 83 S. Ct. 1054, 1057 (1963), *aff'g* 299 F.2d 565, 568 (2nd Cir. 1962); *Factor* v. *Laubenheimer,* 290 U.S. 276, 293-294, 54 S. Ct. 191, 195-196 (1933); *Wright* v. *Henkel,* 190 U.S. 40, 57, 23 S. Ct. 781, 785 (1903); (as evidenced by the treaty itself); *Factor* v. *Laubenheimer, supra* (so as to give a sensible meaning to all of the provisions thereof, if that be practicable) *Sullivan* v. *Kidd, supra; De Goeffrey* v. *Riggs,* 133 U.S. 258, 270, 10 S. Ct. 295, 298 (1890). In so doing, the Courts are not required to abdicate what is basically a judicial function. *Kolovrat* v. *Oregon,* 366 U.S. 187, 194, 81 S. Ct. 922, 926 (1961); *Factor* v. *Laubenheimer, supra; Sullivan* v. *Kidd, supra; Charlton* v. *Kelly,* 229 U.S. 447, 468, 33 S. Ct. 945, 952 (1913); *Argento* v. *Horn,* 241 F.2d 258, 263 (6th Cir. 1957), *cert. den.,* 355

U.S. 818, 78 S.Ct. 23 (1957); *United States* v. *Reid,* 73 F.2d 153, 156 (9th Cir. 1934), *cert. den.,* 299 U.S. 544, 57 S. Ct. 44 (1936); *The Sophie Rickmers,* 45 F.2d 413, 418 (S.D.N.Y. 1930).

It is well established that even though an interpretation of legislation has been affirmed by former adjudication it remains open to inquiry and investigation in the light of *changed conditions.* 11 Am. Jur., *Const. Law,* § 102, p. 738, nn 11-16.

In construing a treaty between the United States and Yugoslavia, the Court in *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961) said that a treaty should be interpreted "in the light of its entire language and history." In resolving any apparent ambiguity, the Court should be guided by principles of moral conscience and justice. *Biggs* v. *Easterly,* 62 Barb. (N.Y.) 51 (1872).

In interpreting Article 28(1), this Court is entitled to employ basic rules of statutory construction. In this connection, one rule is that the Court should consider the spirit of the statute. *Fleischman Const. Co. v. United States,* 270 U.S. 349, 70 L.Ed. 624, 46 S. Ct. 284 (1926); *Carey* v. *Donohue,* 240 U.S. 430, 60 L.Ed. 726, 36 S. Ct. 386 (1916); *Hoyne* v. *Danisch,* 264 Ill. 467, 106 N.E. 341 (1914); *In Interest of Carson,* 10 Ill. App. 3d 384, 295 N.E.2d 740 (1973); *Wigend* v. *Hulsh,* 315 Ill. App. 116, 42 N.E.2d 146 (1942).

Another basic tenet of construction is that the Court is privileged to consider the reasons for the statute. *Continental Illinois Nat'l. Bank* v. *Chicago, R. I. & P. Ry.,* 294 U.S. 648, 791 L.Ed. 1110, 55 S. Ct. 595 (1935); *Sorrells* v. *United States,* 287 U.S. 435, 77 L.Ed. 413, 53 S. Ct. 210 (1932); *United States* v. *Freeman,* 44 U.S. 556, 11 L.Ed.

724 (1845), as well as the objective of the statute. *United States* v. *Champlin Refining Co.,* 341 U.S. 290, 95 L.Ed. 949, 71 S. Ct. 715 (1951); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 84 L.Ed. 1311, 60 S. Ct. 982 (1940); *Gannon* v. *Chicago, M., St. P. & P. Ry.,* 22 Ill. 2d 305, 175 N.E.2d 785 (1961); *Mid-South Chemical Corp.* v. *Carpentier,* 14 Ill. 2d 514, 153 N.E.2d 72 (1958).

A liberal construction is one which places emphasis upon the purposes and spirit of the law over the strict letter. *DuBois* v. *Hepburn,* 25 U.S. (10 Pet.) 1, 9 L.Ed. 325 (1836). Such an interpretation seeks to avoid results at variance with the intent of the law. *International Mercantile Marine Co.* v. *Lowe,* 93 F.2d 633 (2d Cir. 1938); *Becker Steel Co.* v. *Cumming,* 296 U.S. 74, 80 L.Ed. 54, 56 S. Ct. 15 (1935); *Spiller* v. *Atchison, T. & S.F.R.,* 253 U.S. 117, 64 L.Ed. 810, 40 S. Ct. 466 (1920).

In interpreting the Warsaw Convention, Judge Kaufman in *Lisi* v. *Alitalia Airlines,* 370 F.2d 508, 511-12 (2d Cir. 1966), *aff'd* 390 U.S. 455 (1968), stated: "The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, 'words are such tempermental beings that the surest way to lose their essence is to take them at their face.'"

A literal reading of the word "domicile" in Article 28 as meaning solely and only the country of incorporation loses the essence of that word. The word "domicile," in the French language is not equatable with the legal meaning of the word, "domicile," in the English language. As pointed out in *Eck* v. *United Arab Airles, Inc.,* 15 N.Y. 2d 53, 59 n. 2, 255 N.Y.S. 2d 249, 251, 203 N.E.2d 640, 641 n. 2 (1964): "When the Convention was originally drafted in 1926, Charles Lindbergh had not flown to Paris. When it was first adopted, Air France had two overseas flights,

one from Paris to London and the other from Marseilles to Tunis. Pan American flew from Key West to Havana."

It is inane to say that delegates from Spain, Brazil, Yugoslavia, Rumania, France, Poland, and Latvia, who met in Warsaw, Poland, between 1925 and 1929 had the prescience to employ a French word, "domicile," which also happened to be an English word, in the context of its meaning in United States corporation law i.e., as meaning the state within the United States where a corporate airline was incorporated. Such an interpretation is so inconsistent with reality and the history of and minutes pertaining to the Warsaw Convention that it is the province of the United States Supreme Court to clarify the meaning of Article 28 in the light of modern conditions, including the existence of many multinational international airlines such as Air France, which are "domiciled" in various nations.

The Illinois Supreme Court adopted an erroneous interpretation of Article 28(1) in regard to this litigation which involves plaintiffs principally from Israel, some from France, others from Canada, Spain and Morocco. The defendants are multinational airlines, having their principal places of business respectively in Paris, Singapore, and Abu Dhabi. The hijacking took place over Greece and the Ionian Sea. The plane was forced to land at Benghazi, Libya, and then flown to Uganda. The imprisonment of plaintiffs took place in Entebbe, Uganda. The injuries to most of them and the deaths of four of them took place in Uganda.

The constricted interpretation of Article 28(1) by the Illinois Superme Court would mean that some plaintiffs might have to sue some defendants in different courts throughout the world.

It is difficult to believe that more than fifty years ago, when Article 28(1) was drafted in Poland, utilizing the French language, the drafters intended that the word "domicile" should be interpreted and applied so as to preclude suits, such as that of the case at bar, against airlines which carry on a substantial amount of business within a nation.

The history of the Warsaw Convention is the opposite. Article 28(1) was never intended to thus restrict the filing of suits. Rather, it was intended to prevent suits *where the aircraft may have crashed* because the courts of such a country might not be suitable. *Translation of Minutes of Warsaw Convention, Clarke,* pg. 187; Goedhuis, *National Airlegislations and the Warsaw Convention,* 286-289.

There is no "World Court" which has jurisdiction to resolve this type of case. Within the framework of the outmoded existing law, the Circuit Court of Cook County constitutes a proper forum where this suit properly has been brought against all three airlines. All that the plaintiffs seek is the presentment of their cause to a jury of twelve disinterested persons.

Normally, as has been indicated, suits such as this are not filed in the state courts of this country, but in federal courts.

By force of circumstances, the Circuit Court of Cook County had presented to it a case of international significance and a case which is upon the world stage.

There is an excess of platitudinism about human rights and civil rights. The plaintiffs have human and civil rights to have their case heard by a court which can resolve all their claims against all the defendants in a single tribunal.

It so happens that the Circuit Court of Cook County is the court where the plaintiffs were virtually forced to seek redress because of the archaic status of the law pertaining *in personam* jurisdiction. Significantly, the defendants, Air France, Singapore Airlines and Gulf Air at no time agreed upon any forum in any country anywhere, where all of them could agree to submit to jurisdiction. The Circuit Court Judge, Honorable Louis Giliberto, specifically invited the defendants to specify any such forum. They did not do so.

Judge Giliberto adopted a realistic, sound view, namely, that the meaning of the word "domicile" in the Warsaw Convention, as applied to incorporated international airlines, should not be inflexibly interpreted so as to mean solely the country where the airline is incorporated. Otherwise, that country would always be the country of the principal place of business of the carrier. Such an interpretation would result in the words, "le tribunal du domicile du transporteur" having no meaning or effect whatever, because they would not provide for suit by a passenger in a *fourth place.*

Article 28 was intended to provide for *four* places where passengers could bring suit: (1) the country where they make their contract of carriage (purchase their tickets); (2) the country where the airport constituting their final ticketed destination is located; (3) the country constituting the principal place of business of the airline; (4) the country constituting "domicile" of the airline.

The Illinois Supreme Court did not even refer to the French text. Instead, it quoted an English language translation contained in the Statutes at Large, which is "unofficial." In reference to the contention of the plaintiffs regarding the word "domicile," the Illinois Supreme Court

indulged in a construction of Article 28(1) which is contrary to the recorded history of the Convention. That court apparently recognized the incongruity of construing the word "domicile" as meaning solely the country of incorporation because that country would inevitably be the country where the principal place of business was located, thus reducing the number of nations where suit could be brought to three nations rather than four nations, as Article 28(1) was intended to provide. However, the Illinois Court said:

> Adopting the plaintiffs' theory would at a minimum blur these carefully drawn distinctions by creating a third intermediate category. It would obviously introduce uncertainty into litigation under the article because of the necessity of having to determine, and without standards or criteria, whether the amount of business done by a carrier in a particular country was "regular" and "substantial." The plaintiffs' request to adopt this basis of jurisdiction is in effect a request to create a new jurisdictional standard for the Convention.

The same uncertainty could be said for the determination of *in personam* jurisdiction in any case initiated in any forum, based upon *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), which holds:

> . . . Due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The Illinois court referred to "carefully drawn distinctions"—as though in 1925 when the Warsaw Convention was first drafted, countries such as Latvia, Yugoslavia, Ru-

mania and Brazil intended to specify "carefully drawn distinctions"—including the use of the French word, the word "domicile"—which fifty years later was to mean the country where an airline happened to file its incorporation papers—because the law of the United States of America (which did not even participate in the drafting of the treaty) holds that the word "domicile" in the English language, as applied to a corporation, means the country where it was incorporated. Of course, in 1925, well before Lindbergh flew the Atlantic ocean, "international" flights were but a few hundred miles. Air carriers were owned by individuals. The word "domicile" was intended to apply to all persons, firms or corporations which operated airlines. It is incongruous to hold that the drafters of the Warsaw Convention intended to employ a *French* word, "domicile," in the United States law's connotation of that word *in reference to corporations.*

Rather than permitting such an unsupported interpretation of a treaty of the United States to stand uncorrected, it is respectfully submitted that this Court should accept this opportunity to bring some common sense and recognition of the history of the Warsaw Convention to its interpretation.

Multinational corporations, such as international airlines, were unknown in 1925, when the Warsaw Convention was drafted. Corporations in that era were incorporated in the same *country* that they carried on their principal place of business. This remains true today. Air France is incorporated in France and carries on its principal place of business in France. Trans World Airlines is incorporated in the United States and carries on its principal place of business in the United States. We could

name all international airlines and point out that in virtually each instance the airline is incorporated in the same *country* where it carries on its principal place of business. However, many of these airlines are multinational corporations which carry on substantial business on a regular basis in various nations.

The Illinois Supreme Court cited *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2nd Cir. 1971). In that case, however, the issue here presented was not argued. The plaintiff in *Smith* did not file Affidavits concerning the meaning of Article 28 or Affidavits concerning the fact that the defendant in that case was in fact "domiciled" within the United States within the meaning of Article 28, as was done in this case. The parties and the *Smith* Court merely *assumed* that the word "domiciled" should be given the technical meaning given by United States law, as applied to corporations.

In *Smith*, the plaintiff contended that merely because Canadian Pacific Airways had *a* place of business within the jurisdiction of the Court, there was sufficient contact to confer jurisdiction of that airline under the provisions of Article 28(1) relating to the *principal place of business.*

Plaintiffs herein refer to the word "*domicile*" as the as to Air France.

Plaintiffs herein filed the affidavit of a French language expert as to the meaning of "domicile" in Article 28, and also affidavits as to the extent of the activities of Air France not only in Illinois but throughout the United States to show that it is in fact domiciled in the United States, in the sense that as a multinational corporation it carries on business in the United States on a regular and substantial basis.

Air France filed no counter-affidavit of any kind to contradict the affidavit of the French language expert, filed by the plaintiffs.

If Air France seriously disputed the accuracy of this affidavit, surely it could have obtained and filed a counter-affidavit.

The affidavit filed by plaintiffs stands completely *undisputed* in this record.

It states without contradiction that "the words 'du domicile du transporteur' as stated in Article 28(1) of the Warsaw Convention meant, when adopted in 1929, and now mean the place or places where a person (whether an individual, partnership, unincorporated company or corporation) is or are ordinarily resident, that is, where any such entity can be reasonably stated to carry on a reasonably substantial amount of activities on a reasonably continuous basis"; that "such words were never intended to mean and do not mean, as applied to an airline operation, that the sole and only place where suit may be instituted against an airline corporation, within the meaning of those words, is the state or nation in which such airline was incorporated"; that "such words meant and mean any place where an air carrier carries on the business of an air carrier on a regular and substantial basis"; and that the "word 'domicile' in the French language has a general meaning which includes places where persons are resident and as to corporations where they are resident, that is, where they carry on business in a substantial manner and a reasonably continuous basis."

The language of Article 28 is not ambiguous and well established rules of statutory construction warrant a ruling that the word, "domicile," should not be given a interpretation which would, in practical terms, equate it with principal place of business, and thus render it redundant, superfluous and meaningless.

The Illinois Supreme Court did not even mention this uncontradicted affidavit, filed on behalf of the plaintiffs.

At the very least, the meaning of the word "domicile," is ambiguous. Under the authority of *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848 (1974), Judge Giliberto properly ruled that the uncontradicted affidavit filed by plaintiffs concerning the meaning of the word "domicile" in Article 28(1) was consistent with a realistic interpretation of that French word, as employed in Article 28(1).

The holding of the Circuit Court regarding the meaning of Article 28(1) of the Warsaw Convention is reinforced by an article entitled, *Jurisdiction Under Article 28 of the Warsaw Convention,* 9 McGill L. J. 352 at 354 (1963) in which the author stated: ". . . it would seem that under Article 28 the idea of the court of the domicile of the carrier, or of the main office of its business, is a divisible notion which recurs in *each country where the enterprise has important business. . . .*" (Emphasis added.) Furthermore, at page 355, the following was stated:

> Finally, in construing words used in a treaty, too great weight should not be given to the *local definition and use of particular words,* as seems to be the case in the interpretation of "domicile" and "principal place of business" • • • Treaties should be construed to tend toward placing contracting parties on an equality. And where a treaty admits to two constructions, one restrictive as to the rights which may be claimed under it, and the other favorable to such rights, *the latter is preferred.*
>
> • • •

It is suggested that Article 28(1) should, in minimum terms of liberality, be construed to mean that where the domicile *or an important place of business of the carrier* is within the *territory* of one of the high contracting parties, then suit may be brought by a plaintiff *in that country as permitted by its laws.* (Emphasis added).

It is undisputed that the United States of America is an "important place of business" of Air France. Plaintiff filed an affidavit which verified that fact. That affidavit also stands undisputed by Air France.

In another article entitled, *Competence Jurisdictionnelle et lex Fori Dans la Convention de Varsovie,* appearing in 8 McGill L. J. at 284 (1962), the author states that the words in Article 28(1) as they appear in the original French text, "du domicile du transporteur," referred mean "[T]he Court having jurisdiction where the carrier is *ordinarily resident.*"

If alternative meanings can be placed upon legislation, the one adopted should be that which is least restrictive of the rights of individuals. *Universal Adjustment Corporation* v. *Midland Bank,* 281 Mass. 303, 184 N.E. 152 (1933). The rule which invalidates contract provisions which restrict the rights of passengers has persuasive bearing on this point. 13 C.J.S. *Carriers* § 629 at 1182.

Goedhuis, *National Airlegislations and the Warsaw Convention* (1937) states at page 286:

> *Courts declared competent*
>
> Article 28.
>
> 1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is *ordinarily resident, or* has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination. (Italics supplied)

Goedhuis emphasized that the purpose of Article 28(1) was to prevent the filing of suits in Courts of countries *where planes crashed.* See also *Minutes of the Second International Conference for Private Air Law* (Warsaw, Poland, Oct. 4-17, 1929) at 78. It is important to note Goedhuis' employment of the words "where the carrier is *ordinarily* resident" as a proper forum *in addition* to a forum in a nation where the carrier "has his principal place of business."

For this Court to sanction the interpretation of Article 28(1) in the narrow, constricted manner adopted by the Illinois Supreme Court, so as to mean solely the nation of incorporation of an incorporated airline, would not be in accord with the counsel of Justice Holmes in *Missouri* v. *Holland,* 25 U.S. 416, 40 S.Ct. 383, 64 L.Ed. 641 (1920):

> [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

III.

THE WARSAW CONVENTION, IF APPLICABLE, IS UNCONSTITUTIONAL.

It Is Unconstitutional Insofar As It Purports To Deprive Plaintiffs, Although Aliens, of the Right To File Suit In The Circuit Court of Cook County, Illinois.

Plaintiffs are aliens. They brought suit in the Circuit Court of Cook County because the three defendant airlines carry on business in the jurisdiction of that Court.

The Fourteenth Amendment states: "*No State* shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States."

The "due process" provision, however, does not refer to and is not limited to "citizens."

A "*State*" may not deprive any *person* of "life, liberty, *or property, without due process of law.*"

The Supreme Court of Illinois is an arm of the State of Illinois. Defendants by doing business in Illinois and the United States, are subject to the due process clauses of the United States Constitution. In *The Sapphire,* 78 U. S. (11 Wall.) 164, 20 L.Ed. 127 (1870), the Court said:

> The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, *as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts.* [387 Supp. at 191.] (Emphasis added.)

Defendants are multinational corporations, which carry on substantial business in the United States. Such defendants are subject to the due process and equal protection clauses of the Constitution of the United States, in the sense that if they are subject to the jurisdiction of a state court within the United States, then that state court, as an arm of the state, may not deprive any party to the suit, whether an "alien" plaintiff, or not, of due process and equal protection. *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 120 (1866); Leighton, *The Rights of Man in the World Community,* 14 L. & Contemp. Prob. 490, 527 (1949). Despite the fact that the Warsaw Convention was adopted by the United States in 1934, no appellate court has to date passed upon the constitutionality of the treaty.

Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents,* 33 J. Air L. & Com. 137, 149 (1967).

The Illinois Supreme Court by construing Article 28 so as to take away the otherwise existing right of the plaintiffs to bring their action in the Circuit Court of Cook County denied to the plaintiffs due process and equal protection of the laws.

In *Burdell* v. *Canadian Pacific Airlines,* 10 Av.L.Rep. (CCH) 18,151 (1968), then Illinois Circuit Judge Nicholas J. Bua initially declared that not only the monetary damage limitation provisions but also the provisions of Article 28(1) in reference to where suit can be brought also are unconstitutional. In a second opinion (11 Av.L.Rep. (CCH) 17,351 at 17,354 (1969)), Judge Bua stated that he had determined it was not necessary to pass upon the constitutionality of the Warsaw Convention because plaintiffs were entitled to recover on other grounds principally that the tickets were deficient. However, Judge Bua reaffirmed his belief concerning the unconstitutionality of the damage limitations and place of suit restrictions. We recognize that this decision is that of a lower court. Nonetheless, the first opinion received favorable reviews from leading constitutional law scholars.

In commenting on the *Burdell* decision, Professor Arthur John Keeffe, said:

> It is a dreadful thing to have to say, but, in truth, decisions such as *Kilberg, Pearsons, Long* and *Scott* lack the simplicity and honesty of Judge Bua's ruling in *Burdell. Here at last is a Judge who faces up to the real problem, the constitutionality of outrageous, discriminatory, out of date, rotten laws.* Keeffe, *In Praise of Joseph Story,* Swift v. Tyson *and "The"*

True National Common Law, 18 Am. U.L. Rev. 316, 356 (1969). (Emphasis added.)

An alien may maintain a cause of action against another alien for a tort committed outside the jurisdiction. *Gardner* v. *Thomas* 14 Johns. 134, 7 Am. Dec. 445 (N.Y. 1817). A cause of action is a property right, and a person may not be deprived of his cause of action without due process of law. *Angle* v. *Chicago, St. P.M. & O.Ry.*, 151 U.S. 1 (1894).

Plaintiffs are "persons". Once they instituted litigation in a court which had the power to hear the *type* of case which was filed, they may not be deprived of due process or equal protection, including *equal access* with that of United States citizens to the courts of the United States which would otherwise have jurisdiction, simply because they are aliens. The Treaties of Friendship between the United States and Israel, as well as France and other countries, contain explicit provisions in this respect; e.g., "Nationals • • • shall be accorded • • • most favored treatment with respect to access to the courts of justice • • • within the territories of the other party."

Plaintiffs paid the same fare as such American passengers and occupied the same aircraft. The place of purchase of tickets hardly supplies a "rational basis" for unequal treatment of the plaintiffs by the Illinois court. That court repeatedly emphasized that the plaintiffs were not citizens of the United States, as though that fact warranted discriminatory treatment. *Rinaldi* v. *Yaeger*, 384 U.S. 305, 308-09 (1966).

A treaty discrimination or classification must, at a minimum, bear some rational relationship to a legitimate purpose. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Morey* v. *Doud*, 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colo. and S. Fe R. R.* v *Ellis*, 165 U.S. 150 (1897); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *James* v. *Strange*, 407 U.S. 128 (1972); *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932); *Rinaldi* v. *Yaeger*, 384 U.S. 305 (1966).

The United States Supreme Court has held that non-resident aliens are protected by the due process clause. Indeed, non-resident aliens, *where defendants*, have frequently urged that they are protected by the due process clause. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473 (1931); *United States* v. *Pink*, 315 U.S. 203, 228 (1942).

An "alien" is a "person" entitled to the same protection for his life, liberty and property as is afforded to a citizen. *Galvan* v. *Press*, 347 U.S. 522 (1954), *rehearing denied*, 348 U.S. 852 (1954), 99 L.Ed. 671. See also, *U.S.* v. *Pink*, 315 U.S. 203, 86 L.Ed. 796 (1942); *U.S. ex rel. Martinez-Angosto* v. *Mason*, 232 F.Supp. 102 (D.C.N.Y. 1964), *reversed on other grounds*, 344 F.2d 673; *Hee Chan* v. *Pillior*, 178 F.Supp. 793 (D.C.Ill. 1959); *U.S. ex rel. Castro Louzan* v. *Zimmerman*, 94 F.Supp. 22 (D.C.Pa. 1950).

Air France may not have the benefit of carrying on business in the United States and at the same time have the benefit of the unconstitutional denial to the plaintiffs of their fundamental human rights, to due process and equal protection of the laws.

Courts have the power and duty to declare treaties which violate basic constitutional rights invalid. *Reid* v. *Covert*, 354 U.S. 1, 17-18 (1957); *United States* v. *Minnesota*, 270 U.S. 180, 208 (1926); *Cherokee* v. *United States*, 78 U.S. 616 (1870); Puente, *International Law* 198 (1928);

52 Am.Jur. *Treaties*, at 809; 2 Story, *Commentaries on the Constitution of the United States* 1508; Cooley, *Principles of Constitutional Law*, at 117; Hayes, *Supernational Organizations and United States Constitutional Law*, 6 *Va. J. Int'l. L.* 195, 197-209 (1966); Dorsey, *Subject Matter Limitations on the Treaty Power*, 4 Int. Lawyer 209 (1970).

The Warsaw Convention is a private international treaty, involving the rights and responsibilities of only *private individuals*. It is not a public treaty. The distinction between public and private treaties was pointed out by the Supreme Court in *Haver* v. *Yaker*, 76 U.S. (9 Wall.) 32, 34 (1869).

The Warsaw Convention is unconstitutional in so far as it provides for (1) an arbitrary monetary limitation, applicable only to airlines, which insulates airlines, as opposed to the United States of America and United States aircraft and component part manufacturers, (2) an artificial standard of proof to recover in excess of such limitations, i.e. proof of wilful misconduct, whereas the United States of America, aircraft manufacturers and all other defendants are liable without limitation for their mere negligence, or, in the case of manufacturers, regardless of their lack of negligence (*Restatement, Second, Torts* §402(A).); and (3) arbitrary limitations concerning places to sue, which are contrary to well-established legal principles concerning the rights of persons, whether citizens or aliens, to bring suits against persons, firms, or corporations whether citizens or aliens, who would otherwise be subject to jurisdiction in a particular court.

These provisions were designed solely to extend grossly unequal preferential benefits to *airlines* in respect to international transportation. They involve purely *private* interests. The provisions discriminate not only against

plaintiffs, but against aircraft manufacturers and even the United States government.

McDonnell Douglas Corporation filed a brief in respect to litigation growing out the the DC10 Paris aircrash, previously referred to herein (*In Re Paris Aircrash*, 399 F. Supp. 732 (1975). It argued the same position advanced by plaintiffs herein:

> The Warsaw Convention, particularly Article 28(1), creates two irrational distinctions between categories of individuals which deny them equal protection under the law. These distinctions are: (1) the distinction drawn between passengers traveling between High Contracting Parties (in which case they are covered by the Warsaw Convention), and those international travelers traveling between a High Contracting Party and a non-signatory like Turkey (in which case they are not covered); and (2) the particular benefit conferred upon airlines by Article 28(1) protecting them from suits in all but four specified jurisdictions while aircraft manufacturers and other potential defendants are subject to suit wherever jurisdiction may be obtained over them. *Because these distinctions are not rationally related to permissible legislative goals, they cannot be sustained. Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971). See also Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-37 (1972). (Italics supplied)

Brief for McDonnell Douglas, *In re: Paris Aircrash*, 399 F.Supp. 732 (1975)

Although neither any aircraft manufacturers or the United States of America is named as a defendant herein, the analogy remains. If instead of a hijacking, these same plaintiffs were involved in an aircrash at Entebbe, Uganda, and if the aircraft had been manufactured in the United States (such as a McDonnell Douglas DC10 or Boeing

747), and if the manufacturer was named as a defendant along with the air carrier, Air France, plaintiffs clearly would have the right to sue such American manufacturer in the American courts, but not Air France—if Article 28(1) is to be construed in the way the Illinois Supreme Court construed it. Similarly, the United States of America could be sued in the federal court of the United States, if it were charged with negligent certification within the United States. *In Re Paris Aircrash*, 399 F. Supp. 732 (1975)).

Thus, it is clear that Article 28(1) is unconstitutional not only as to plaintiffs herein, but it is should be declared unconstitutional because it discriminates against United States aircraft manfacturers and the United States of America.

This case presents a unique opportunity for this Court to review this fifty year old treaty, which, if it ever had any validity, no longer has any semblance of a rational basis for such preferential treatment of airlines, which results in such discriminatory treatment of all others.

IV.

THE ILLINOIS SUPREME COURT DENIED DUE PROCESS AND EQUAL PROTECTION TO THE PLAINTIFFS IN DISMISSING THEIR SUIT.

The Illinois Supreme Court in emphasizing the fact that plaintiffs were citizens of foreign countries, principally Israel, violated the Treaty of Friendship, Commerce and Navigation between the U.S. and Israel, 5 U.S.T. 550, T.I.A.S. 2948, and the Convention of Establishment Between the U.S. and France, 11 U.S.T. 2398, T.I.A.S. 4625.

Those treaties, previously quoted herein, explicitly guarantee the constitutional rights of aliens or foreigners to equal access to the courts of the United States of

America. The treaty with Israel required the Circuit Court to provide the Israeli plaintiffs with most-favored-nation treatment with respect to access to the courts of justice within the territories of the other Party, *in all degrees of jurisdiction, both in pursuit* and in defense *of their rights.*

Instead, the Court below repeatedly emphasized that plaintiffs were aliens.

Article VI, clause 2 of the Federal Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of the state to the contrary notwithstanding.

A treaty, which affects the rights of litigants, should be regarded as an act of Congress. *Hamilton* v. *Erie R.R. Co.*, 219 N.Y. 343, 114 N.E. 399 (1916). The courts are bound to take judicial notice of treaties and to enforce the rights of persons established by treaties. *United States* v. *Rauscher*, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886). Words used in treaties are to be given in the broadest meaning, in order to effectuate the liberal intentions of the nations which are contracting parties. *Re Fattosini*, 33 Misc 18, 67 N.Y. S. 1119 (1900). Where a treaty is susceptible to two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the liberal reading is to be preferred. *Nielsen* v. *Johnson*, 279 U.S. 47, 49 S. Ct. 233, 73 L. Ed. 607 (1928). Treaties are construed more liberally than private agreements. See

Choctaw Nation v. *U.S.*, 318 U.S. 423 (1943). Where a treaty admits of two constructions, one restrictive of the rights claimed under it, and the other favorable to them, the latter is to be preferred. *Bacardi Corp.* v. *Domenich*, 311 U.S. 150 (1941); *Nielsen* v. *Johnson*, 279 U.S. 47 (1928).

In *Joint Anti-Fascist Refugee Committee* v. *McGrath* 341 U.S. 123, 71 S. Ct. 624 (1950), Mr. Justice Frankfurter emphasized that due process applies to aliens as well as citizens:

> Fairness of procedure is "due process in the primary sense." • • • The requirement of "due process" is not a fair weather or timid assurance. It must be respected in periods of calm and in times of trouble; *it protects aliens as well as citizens.* But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. (Emphasis supplied).

The opinion of the Illinois Supreme Court denies to the plaintiffs rights to which they are entitled under the Constitution of the United States and pursuant to treaties. The Illinois Supreme Court emphasized "all of the parties are non-resident aliens." In doing so, that Court failed to recognize that aliens should not be the subject of discrimination, unequal treatment and denial of due process.

VI.

THE ILLINOIS SUPREME COURT IN UNCONDITIONALLY DISMISSING THE PLAINTIFFS' SUIT UPON THE BASIS OF THE DOCTRINE OF FORUM NON CONVENIENS DENIED DUE PROCESS AND EQUAL PROTECTION TO THE PLAINTIFFS.

In dismissing the case *unconditionally* on the basis of *forum non conveniens*, the opinion of the Illinois Court

denies due process and equal protection of the laws to the plaintiffs. The Court failed to comply with fundamental principles established by this Court beginning with *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947). In *Gulf Oil Corp.*, this Court said, "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U.S. 501, 506-07 (1947).

There was no pleading of any defendant which pleaded the existence of any alternative forum, supported by any affidavit or any proof whatever that any other court anywhere would have jurisdiction of the three defendant airlines, Air France, Singapore Airlines and Gulf Air, much less that they would accept and retain their suits.

There was no question but that the Circuit Court of Cook County had *in personam* and subject matter jurisdiction as to Air France and Singapore Airlines.

None of Air France's pleadings properly specified any alternative forum. Air France's *Brief* in the Illinois Supreme Court (not its pleadings) merely suggested that the World Aviation Directory showed that certain of the defendant airlines flew into various cities. Even assuming that the unverified, gratuitous statement in Air France's *Brief* constituted a pleading, there was no affidavit as to the foreign law of any of those suggested countries to the effect that such activities authorized *in personam jurisdiction* of those airlines by the courts of those countries. Nor were any affidavits filed that the courts of those countries would accept and keep the suits of plaintiffs.

Singapore's motion to Dismiss (Appendix B) pleaded only one alternative forum, the courts of England. Nowhere did that motion plead that the *law of England* would permit suit in England against Singapore, Gulf Air or Air France.

Indeed, the same arguments could be made in England, Greece or the Netherlands in respect to *forum non conveniens* as were made in the Circuit Court of Cook County, i.e. that none of the plaintiffs lived in England, that none of the defendants carried on its principal place of business in England, that none of the witnesses (except one who temporarily was in England and whose deposition was taken) lived in England, that none of the occurrences took place in England and that none of the substantive laws of England applied.

Indeed, the only pleading of any kind filed by Air France consisted of an affidavit of its *French* counsel which stated his opinion that *only fifteen of the eighty-one* plaintiffs might be able to sue the three defendants in France, because such fifteen plaintiffs are French nationals. The affidavit states that Article 14 of the French Civil Code would permit such a suit.

The distinguished counsel for Air France, Mr. Andre Garnault, and the respected United States counsel for Air France, are too lawyerlike to file an affidavit that the laws of England, Greece, The Netherlands or France, authorize jurisdiction of the suit of the plaintiffs herein as to Air France, Singapore Airlines and Gulf Airlines.

The opinion of the Illinois Supreme Court relegated plaintiffs to "potential forums" and improperly *unconditionally* dismissed plaintiffs' suit.

Singapore's distinguished counsel likewise filed no such affidavit.

No affidavit was filed by Air France or Singapore Airlines stating that the defendant airlines could be sued by all plaintiffs *in any single forum*. A basis of the motion of Singapore Airlines peculiarly and somewhat condescendingly is that "British judges would be better qualified to interpret and apply the laws of that country (Uganda)."

The motion of Singapore Airlines on its face required its denial.

The motion of Singapore Airlines states:

> (a) that such defendant does *not* suggest that this Honorable Court would not afford all parties an impartial trial;
> (b) no single forum can be immediately convenient to all parties and potential witnesses in this geographically extensive litigation.

The opinion of the Illinois Supreme Court is not in compliance with the requirement that there be an alternative forum which (1) has jurisdiction of the subject matter and of the parties, (2) which will accept and keep the case and (3) which can provide effective redress. The Illinois Supreme Court said:

> A motion to dismiss on the ground of *forum non conveniens* presupposes that more than one court can be used as a forum. (*Adkins* v. *Chicago, Rock Island & Pacific R.R. Co.* (1973), 54 Ill. 2d 511, 515.) Singapore *has suggested* the United Kingdom as an alternative forum; all of the defendants operate commercial flights into London and are amenable to service of process there. Singapore also points out that the courts of the United Kingdom are thousands of miles closer to all sources of proof; discovery has already commenced in London, Singapore states, *and at least one so-called protective suit has been filed in England*

> *by one of the plaintiffs in this suit.* Of course, Singapore and Air France operate flights into and out of Greece, where the hijackers alighted from one carrier's plane and boarded the other's; and Singapore, Air France and Gulf all operate flights into and out of France and the Netherlands. Any of these *potential forums* would provide, in varying degrees, greater "relative ease of access to sources of proof," and lesser "cost of obtaining attendance of willing witnesses" than a forum in the center of the United States. *Gulf Oil Corp.* v. *Gilbert* (1947), 330 U.S. 501, 508, 91 L. Ed. 1055, 67 S. Ct. 839, 843. (Italics supplied).

The opinion of the Illinois Supreme Court violates basic rights of these plaintiffs in *unconstitutionally* dismissing their suit, on the basis they could file suits in other "*potential*" forums.

Webster defines "potential" as "existing in possibility."

The Illinois Court clearly did not comply with the mandate of this Court, expressed in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947) and its progeny.

"Potential forums," not even pleaded by defendants, hardly constitute a basis to throw these plaintiffs out of court.

Furthermore, the court misapprehended the record. The only "discovery" which was carried out in London was the deposition of Henry Kyemba, former Minister of Health in Uganda who had temporarily sought refuge in London. There is no pleading of any kind indicating there is any other discovery whatever to be carried out in England. There is none.

There was *not a* "so-called protective suit filed in England." That suit was a quasi-criminal action against Idi

Amin, President of Uganda, which did not even name *any* of the three airlines as defendants. See Appendix B. There are no witnesses in England. No plaintiffs reside in England. The English courts cannot compel the attendance of any witnesses.

The gross misrepresentation of the record by the court below in a suit of this importance is tantamount to an unconstitutional denial of due process and equal protection to the plaintiffs.

Furthermore, the use of the words "*at least* one so-called protective suit" infers that other suits were filed in England. This is not true. That is a further misrepresentation of the record.

The opinion of the Illinois Supreme Court states that "all of the defendants operate commercial flights into London and are amenable to service of process there." Even assuming this is so, there is nothing in the record to state that the fact that commercial airlines fly into London is equatable with *in personam* jurisdiction in London. Nothing was filed by any defendant which purported to state the law of England in this respect. Besides, there is nothing in the record which even remotely purports to state that the Courts of England would accept this litigation. They also have their backlog of cases. They also are concerned with their residents.

The Illinois Supreme Court also stated: "Singapore, Air France and Gulf all operate flights into and out of France and the Netherlands." There is *nothing* in the record, affidavits or otherwise, which supports any holding that the courts of France or The Netherlands would have jurisdiction of such airlines in this case.

The mere fact that the defendants might operate flights into those countries does not mean that the courts of those

countries would have jurisdiction of the defendants or of this litigation—or if they did, that they would retain the case. There is nothing in the record to support the Court's conclusion that such "potential forums" either have jurisdiction of the defendant airlines, or that they would accept these cases. There is nothing in the record concerning the jurisdiction requirements of such other countries.

A motion to dismiss on the ground of *forum non conveniens* presupposes that there definitely is a more convenient forum available, which clearly has jurisdiction of the parties and the subject matter, and which will accept and retain the case.

The record shows that the trial judge specifically asked the defendants if they could agree upon or point out the existence of *any* viable alternative forum where all defendant airlines could be sued and where the defendant airlines would agree to litigate the claims of the plaintiffs.

The defendants would not agree upon any alternative forum where they would agree to litigate the claims of the plaintiffs.

There is no basis in the record for the statement of the Illinois Supreme Court that the courts of The Netherlands, England or France or Greece would have jurisdiction of the claims of the plaintiffs against the three defendant airlines.

In emphasizing the calendar conditions of the Circuit Court of Illinois, and that plaintiffs were not citizens of Illinois, the opinion of the court below discriminates against the plaintiffs because they are aliens.

In *Varkonyi* v. *S. A. Empressa De Viaco Aurea B.G.* (*Varig*), 22 N.Y. 2d 333, 329 N.E. 2d 542, 292 N.Y.S. 2d

670 (1968), Judge Keating, in discussing the alleged burden upon the New York courts answered this contention:

> [I]f the controlling consideration in each case were the convenience of the court, as that term was employed in the case at bar, *then it would be difficult to conceive of a case which justifies retention jurisdiction, as our courts are always inconvenienced by the trial of actions having no relation to this State and its residents.* (Italics supplied.)

Judge Keating also aptly observed that to require plaintiffs to litigate in *different jurisdictions against different defendants,* "would not only work great hardship and expense upon the widow, children and other survivors of those killed, *but would also interfere with the orderly adjudication of the actions*;" * * * that if plaintiffs have to bring suits against different defendants in different jurisdictions "each defendant may point to the other as being responsible for the accident; and the plaintiff, a widow residing in Europe, with limited means, would have the burden of pursuing her proof against one defendant in North America and against the other defendant in South America."

The opinion below, however, seems to hold that the mere fact that the plaintiffs would have to sue the defendants in different jurisdictions was of no significance. In doing so, the Court noted that it could perceive no problems to the plaintiffs, if various of the plaintiffs were required to sue different defendants in different courts. This suggestion is not only not consonant with reality, but is contrary to the express holding of the Illinois Supreme Court. In *People ex rel. Phillips Petroleum Co.* v. *Gitchoff*, 357 N.E. 2d 534 (Ill. 1976), that same court said:

> It is entirely clear that the pendency before different judges of separate suits involving identical parties and issues is incompatible with the orderly and efficient administration of justice. 357 N.E. 2d at 538.

It is fundamental that the defendants must *plead* an alternative forum in which the plaintiff may obtain effective redress. Mere suggestions, unsupported by proof of the jurisdiction of potential alternative courts, does not begin to warrant *unconditional dismissal.* In *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506-07 (1947), the Supreme Court categorically stated two basic rules: (a) "[U]nless the balance *is strongly in favor of the defendant,* the plaintiff's choice of forum should rarely be disturbed." (b) "In all cases in which the doctrine of *forum non conveniens* comes into play, it pre-supposes *at least two forums* in which the defendant *is amenable to process. . . .*" (Italics supplied).

Before the doctrine comes into play, jurisdiction in such alternative forum "*shall not be dependent merely upon the will or grace of the defendant, but must be provided by law.*" *Tivoli Realty* v. *Interstate Circuit,* 167 F.2d 155 (5th Cir. 1948), *cert. denied,* 334 U.S. 837 (1948).

There is nothing in the record to show that the *law* of England, France, The Netherlands or Greece would authorize *in personam* jurisdiction of the *three* defendants.

Dismissal of a case on the basis of *forum non conveniens* is an extremely harsh remedy, and much harsher than transfer under 28 USC §1404(a). Defendant's burden in proving "inconvenience" and the definite availability of a viable alternative forum is much heavier for dismissal than for a mere transfer to another federal court. Section 1404(a) was enacted in 1948 in an attempt to ameliorate the harshness of the doctrine of *forum non conveniens. Harrison* v. *United Fruit Company,* 141 F. Supp. 35 (S.D.

N.Y. 1956). See also *All States Freight, Inc.* v. *Modarelli,* 196 F.2d 1010 (3rd Cir. 1952).

Previously, the Illinois Supreme Court had stated that dismissal on the basis of *forum non conveniens* is authorized only upon a showing that the case can be tried in another court, "at no sacrifice of full justice." *Marchlik* v. *Coronet Ins. Co.,* 40 Ill. 2d 329, 335, 329 N.E.2d 799 at 803 (1968). Nothing was stated in the opinion in this case even inferring such concern for the plaintiffs herein. Instead, the Illinois Supreme Court reiterated the fact that this litigation involves foreign plaintiffs and foreign law. That is not a basis for dismissal. In *Founding Church of Scientology* v. *Verlag,* 536 F.2d 429 (D.C. Cir. 1976), the court said: "The risk that foreign evidence cannot be obtained is no greater in federal court in the District of Columbia than it would be in a West German court."

In *Grammenos* v. *Lemos,* 457 F.2d 1067, 1074 n.5 (2d Cir. 1972), the court said that a prerequisite of dismissal is that "the defendant *agrees on the record to submit to jurisdiction elsewhere* and to post security for any judgment awarded there." (Italics supplied).

Not only was that not done in this case, but the defendants at no time agreed upon any single jurisdiction where they would submit to jurisdiction, even though specifically asked by the Circuit Court to do so.

Justice Cardozo stated in *Loucks* v. *Standard Oil Co.,* 224 N.Y. 99, 110 and 111 (1918): "The courts are *not* free to refuse to enforce a foreign right at the pleasure of the judges, *to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice,* some prevalent conception of good morals, some deep-rooted tradition of the common weal." (Italics supplied)

In *Schertenleib* v. *Traum*, Doc. No. 78-7049 (2nd Cir. Dec. 15, 1978), the Second Circuit Court of Appeals emphasized the necessity for a court, in *dismissing* a suit based upon *forum non conveniens*, to dismiss the suit *conditionally*, stating:

> To insure that plaintiff is not left remediless, however, *we need to add another condition to the dismissal.* When Judge Metzner (the District Judge) dismissed the action he stated that "[s]hould the Swiss court refuse to exercise jurisdiction, or the defendant refuse to submit to jurisdiction, *plaintiff may move in this court to restore this action." We add the condition that defendant must waive any statute of limitations defense that has arisen since the commence-..ment of this action in the Southern District.* (Italics supplied). Slip opinion at 706.

Similarly, in *Farmanfarmaian* v. *Gulf Oil Corporation*, Docket No. 77-7507 (2nd Cir. Dec. 18, 1978) (not yet reported), the court again emphasized that *dismissal* must be *conditional*, stating:

> [T]hat the defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of suit in this district; (2) *that the defendants consent to the jurisdiction of the Iranian courts*, and that they submit to service of process in Iran, which shall take place within 90 days from the filing of this opinion. (Italics Supplied)

In *Farmanfarmaian*, the court also emphasized that a foreign plaintiff must not be an object of discrimination, stating:

> We feel constrained to comment, however, on statements in the judge's opinion to the effect that a foreign plaintiff's "right to sue in the United States is clearly of a lesser magnitude than that of an American citizen." 437 F Supp at 923, 927. Whatever the merits of that proposition generally, which does find some support in cases suggesting that our courts should be quite cautious in dismissing on forum non conveniens grounds when suit is brought by an American citizen, see, e.g., Olympic Corp. v. Societe Generale, 462 F2d 376, 378 (2d Cir 1972), we think it has no application where, as here, a treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms *no less favorable than those applicable to nationals of the court's country.* 8 United States Treaties and Other International Agreements, 900, 902-03 (1957). (Italics Supplied)

The Illinois Supreme Court, in clear violation of the law pertaining to *forum non conveniens* espoused by this Court, *unconditionally* dismissed the suit at bar stating, with nothing in the record to support it, that plaintiffs could bring their suits in "potential forums," i.e. The Netherlands, France, Greece or England. Even if proper pleadings had been filed by the defendants verifying that under the *laws* of such proposed alternative forums the defendants were subject to suit by the plaintiffs herein, the order of dismissal would still have to be *conditional* —i.e. *conditioned upon the acceptance and retention of the suit of the plaintiffs by such alternative forums.*

The courts of any of the "potential forums" gratuitously referred to by the Illinois Supreme Court (even if suit could be brought in any of such countries) could state the same reasons for refusing to hear these cases as did the Illinois Court: (1) They are too busy because they have their own backlog of cases; (2) plaintiffs are aliens; (3) England could say all defendants are aliens; (4) The Netherlands could say all defendants are aliens; (5) Greece could say all defendants are aliens; (6) The Netherlands, Greece and England could say there are no witnesses in their jurisdiction and none of the plaintiffs live

in their jurisdiction; (7) the French courts hardly constitute a suitable alternative forum which could provide "effective redress"; (8) there is nothing in the record filed by Singapore Airlines or Gulf Air that either of them would accede to jurisdiction in France; (9) there is nothing in the record filed by Air France that it would concede to jurisdiction in England, Greece or The Netherlands; (10) in fact, Air France contends that Article 28(1) is not waivable, and, therefore, it could not agree to jurisdiction of it in England, Greece or The Netherlands even if it wanted to; (11) the mere fact that some of the defendant airlines fly into the Netherlands, Greece, England or France in no way establishes that the courts of those countries have jurisdiction of those airlines as to the claims of the plaintiffs, or if they do that they would retain the case.

The Illinois Supreme Court's opinion, in relegating plaintiffs to instituting suits in those *"potential forums,"* the Netherlands, Greece, England or France, has violated the precepts pertaining the doctrine of *forum non conveniens* which have been established by the Supreme Court of the United States.

The net effect of the opinion of the Illinois Supreme Court is to divide and attempt to conquer the plaintiffs. These plaintiffs should hardly be relegated by the courts of the United States to a lost tribe trying to find some court somewhere which will hear their case. They had a legal right to file their suit in the Circuit Court of Illinois, a court of general jurisdiction, where all defendants carry on business activities.

To compel plaintiffs to litigate their claims in various far-flung jurisdictions on different continents against different defendants in different courts with different languages, different procedural rules, different judges and

different lawyers, would impose upon the plaintiffs an intolerable and unreasonable burden which denies them due process and equal protection of the law.

CONCLUSION

The Illinois court misinterpreted and misapplied various treaties, i.e., The Warsaw Convention, Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, Convention of Establishment Between the U.S. and France, as well as the Constitution of the United States, and disregarded fundamental law pertaining to the rights of litigants, whether they are aliens or not.

There is no "World Court" which has jurisdiction to resolve this type of case. Within the framework of the outmoded existing law, the Circuit Court of Cook County constitutes a proper forum where this suit has properly was brought against all three airlines. All that the plaintiffs seek is the presentment of their cause to a jury of twelve disinterested persons.

Defendants did *not* plead and agree upon any other forum which would have jurisdiction of the defendants and the subject matter of this suit and which would hear and resolve this case and provide fair and effective redress to all parties. Plaintiffs sued in a jurisdiction where they could legally, according to the law of the forum, bring suit against all necessary airlines, aboard whose aircraft the hijackers carried weapons. That Court was the Circuit Court of Cook County.

The Illinois Supreme Court has created a precedent which may destroy the rights of future similar innocent passengers of international airlines who are the victims of hijacking, or other types of international airline accidents.

The courts of civilized nations have a duty to hear cases such as this. In denying the plaintiffs this legal right, the Illinois Supreme Court denied redress to the plaintiffs. The plaintiffs are not second-class citizens, because they are foreigners. The United States of America is saying a great deal about human rights.

It is respectfully submitted that the multiple complex issues involved herein necessitated the length of this petition. Plaintiffs submit that it was necessary to demonstrate, chapter and verse, the extent of the denial to them of their fundamental human rights, to which they are entitled in the courts of the United States.

This Court has an opportunity to demonstrate that the Courts of the United States are humane and compassionate and that the Supreme Court of the United States will require all courts within the United States, state and federal, to comply with the United States Constitution, treaties and well-established law, and not to discriminate against persons who are citizens of other countries when they bring suits in courts in the United States which have jurisdiction of the subject matter and the parties.

Respectfully submitted,

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APPENDIX A

Docket Nos. 50584, 50769 cons.—Agenda 60—May 1978.

THE PEOPLE *ex rel.* COMPAGNIE NATIONALE AIR FRANCE, Petitioner, v. LOUIS J. GILIBERTO, Judge, *et al.*, Respondents—EITAN ARONOWITCH *et al.*, Appellees, v. COMPAGNIE NATIONALE AIR FRANCE *et al.*, Appellants, reported in 74 Ill. 2d 90, 383 N.E. 2d 977 (1978), filed of record on December 4, 1978.

Mr. CHIEF JUSTICE WARD delivered the opinion of the court:

Plaintiff Eitan Aronowitch and some 80 other named plaintiffs brought an action in the circuit court of Cook County against the defendants, Compagnie Nationale Air France (Air France), Singapore Airlines, Ltd. (Singapore), and Gulf Air Lines (Gulf), to recover damages for injuries suffered by the plaintiffs or for the deaths of the decedents of some of the plaintiffs at the hands of four terrorists who hijacked an Air France plane in which the plaintiffs or their decedents were traveling as passengers. For brevity we will use the term "plaintiffs" hereafter to include those plaintiffs' decedents.

Air France moved to dismiss the action on the ground that the court lacked jurisdiction of the action by virtue of article 28 of the Convention for Unification of Certain Rules Relating to International Transportation by Air, commonly known as the Warsaw Convention (49 Stat. 3000 *et seq.*; 49 U.S.C.A. note following section 1502; 3 Av. L. Rep. par. 27,012 *et seq.*) and on the further ground that the suit should be dismissed under the doctrine of *forum non conveniens*. Singapore moved to dismiss the action on the latter ground only.

The circuit court denied the motions to dismiss, and Air France and Singapore prosecuted an interlocutory appeal to the appellate court under Rule 308 (58 Ill. 2d R. 308). Air France was granted leave by this court to file a petition for a writ of *mandamus* directing the trial judge to dismiss Air France from the case. Thereafter we also allowed motions by each defendant to transfer the appeals to the appellate court to this court under Rule 302(b) and to consolidate them with the action for *mandamus*.

The circumstances out of which the present action arose, as alleged in the complaint and in affidavits filed by the parties, are as follows: On the morning of June 27, 1976, the plaintiffs, along with other passengers, boarded an Air France plane at Tel Aviv, Israel. The plane was on a regularly scheduled flight to Paris, France, with an intermediate stop at Athens, Greece. The four persons who later hijacked the place boarded it when it landed at Athens. A few minutes after the plane took off, the hijackers, who were heavily armed, entered the cockpit, commandeered the plane, and forced it to fly to Benghazi, Libya, where it remained about six hours for refueling. During this time the passengers, including the plaintiffs, were compelled to remain aboard. The plane was then forced to fly to Entebbe Airport in Uganda, where it landed at about 3:15 a.m. on June 28. After being kept on the plane for some six hours, the plaintiffs were placed in a vacant terminal building where they remained confined until July 4, when they were rescued by a force of Israeli commandos. The purpose of the hijackers was to hold the plaintiffs and other Jewish passengers as hostages against the release of terrorists being held prisoner in Israel.

None of the plaintiffs are citizens of the United States and none of them reside in the United States.

The complaint alleges that both during the time when they were airborne and also while they were held captive by the hijackers in Entebbe the plaintiffs suffered physical injuries and were threatened with death by the hijackers, and thus experienced nervous shock and mental distress.

The complaint charged Air France with negligence in failing to inspect passengers who boarded the plane at Athens and their luggage. It alleged that, if such an inspection had been made, the arms being carried by the hijackers would have been discovered, the hijackers would have been thwarted, and the injuries inflicted on the plaintiffs would not have occurred. The complaint alleged that the four hijackers had reached Athens airport on a Singapore plane from Bahrain, to which they had been flown on a plane from Abu Dhabi operated by Gulf. Similar allegations of negligence in failing to conduct an inspection of passengers when they boarded were made against Singapore and Gulf. Gulf moved to dismiss the suit as to it on the ground that it had not been properly served with process. That motion is still pending in the circuit court, and Gulf is not a party to the present proceeding.

We consider first the contention made by Air France that suit against it was barred by the Warsaw Convention. Since the present proceeding appears to be the first in which a case of this character has been before this court, some background explanation is appropriate.

The Warsaw Convention became effective February 13, 1933, and was recognized and adhered to by the United States in 1934. In essence the Convention relates to the liability of air carriers for death and damages suffered by passengers in the course of "international transportation," a term which is defined by article 1(2) of the Convention as follows:

> "For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention."

Article 17 of the Convention imposes liability without proof by a plaintiff of negligence or other fault on the part of the defendant:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 20(1) provides a complete defense to the carrier, however, upon proof that it and its "agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Unless the death or damages was caused by what is termed the defendant's "wilful misconduct" (art. 25), the defendant's liability cannot exceed a monetary ceiling which is set by article 22. The original dollar equivalent of the ceiling was approximately $8,300. That ceiling was subsequently increased to about $16,000 by the so-called Hague Protocol of 1955 (3 Av. L. Rep. par. 27,101). The Protocol was signed by the executive branch of the United States government, but was never ratified by the Senate.

With respect to international transportation in which the United States is either the point of origin or of destination or is an agreed stopping place, the Convention and the Protocol were superseded in 1966 by an agreement between the United States and numerous carriers called the "Montreal Agreement" (3 Av. L. Rep. par. 27,130). Under that agreement the maximum damages recoverable were increased to $75,000 (inclusive of legal fees), and the carriers also agreed not to avail themselves of the due care defense contained in article 20(1) of the Convention. The Montreal Agreement was approved by the Civil Aeronautics Board in Order No. 18900 (31 Fed. Reg. 7302 (1966)).

For purposes of the present case neither the Hague Protocol nor the Montreal Agreement need be considered further. For accounts of the developments summarized above see 49 U.S.C.A., note following sec. 1502; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967); *Husserl* v. *Swiss Air Transport Co.* (S.D.N.Y. 1972), 351 F.Supp. 702, 703 n.1; *Husserl* v. *Swiss Air Transport Co.* (S.D.N.Y. 1975), 388 F.Supp. 1238, 1241 nn. 1 & 2, 1244.

The concerned provision in this case is article 28(1), which provides as follows:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court of the place of destination."

It is Air France's position that its domicile is not the United States but France, since the latter is the nation in which the defendant is incorporated, and that Paris, France, is its principal place of business. While Air France does business in Cook County, the plaintiff's contracts for passage were not made in this country; that is to say, their tickets were not purchased here. The place of destination of the Air France flight as specified on the plaintiff's tickets was not the United States. Air France thus contends that the circuit court of Cook County does not fall within any of the alternative forums specified by article 28(1).

The plaintiffs, on the other hand, contend that Air France is domiciled in the United States because it conducts a "substantial" amount of "business" here, that article 28(1) of the Convention is inapplicable because the tickets purchased by the plaintiffs did not contain a notice of the limitation contained in that article of the places where suit might be brought; and that Air France waived any right to challenge the jurisdiction of the circuit court

by having entered a general rather than a special appearance. To the extent that the Convention might be applicable, the plaintiffs also contend that it is unconstitutional.

Before discussing the issues made between the parties we note preliminarily that it is now established that the hijacking of an airplane, and other acts of terrorism committed in the course of international flights, are "accidents" within the meaning of article 17. *Husserl* v. *Swiss Air Transport Co.* (S.D.N.Y. 1972), 351 F. Supp. 702, *aff'd mem.* (2d Cir. 1973), 485 F.2d 1240; *Day* v. *Trans World Airlines, Inc.* (2d Cir. 1975), 528 F.2d 31, 33, 37-38, *cert. denied* (1976), 429 U.S. 890, 50 L. Ed. 2d 172, 97 S. Ct. 246; *Karfunkel* v. *Compagnie Nationale Air France* (S.D.N.Y. 1977), 427 F. Supp. 971.

The complaint alleges:

> "During the said seizure and diversion of said flight to Uganda and during detention from June 27, 1976 until their release, at the Entebbe Airport, said plaintiffs were severely injured, threatened, hurt, denied adequate shelter, clothing, food and drink, proper sanitary facilities and medical attention and put in fear for their health and their lives, resulting in injuries to them and each of them."

From more specific allegations made later in the complaint it appears that some, at least, of the threats and physical injuries to which the plaintiffs were allegedly subjected may not have taken place while they were aboard the plane but rather while they were kept in detention at Entebbe. Assuming that to be the case the Warsaw Convention would not thereby be rendered inapplicable to this suit. Its applicability, under article 17, depends upon the place where the "accident," rather than the resulting injuries, occurred, and the "accident," as already noted, consisted of the hijacking itself. (*Cf. Husserl* v. *Swiss Air Transport Co.* (S.D.N.Y. 1975), 388 F. Supp. 1238, 1245-46). Moreover, the removal of the plaintiffs by the hijackers at a point which was neither their intended destination nor an intended intermediate stop cannot realistically be

looked upon as a "disembarkation" which would terminate Air France's liability under article 17. *Cf. MacDonald* v. *Air Canada* (1st Cir. 1971), 439 F.2d 1402; *Hernandez* v. *Air France* (1st Cir. 1976), 545 F.2d 279, *cert. denied* (1977), 430 U.S. 950, 51 L. Ed. 2d 800, 97 S. Ct. 1592; *Maugnie* v. *Compagnie Nationale Air France* (9th Cir. 1977), 549 F.2d 1256, *cert. denied* (1977), 431 U.S. 974, 53 L. Ed. 2d 1072, 97 S. Ct. 2939.

The plaintiffs' first contention is that Air France is domiciled in the United States. They say that the domicile of a corporation as that term is used in article 28(1) includes any country where the airline carries on its business on "a regular and substantial basis," and that the United States qualifies under such a definition. The meaning of domicile cannot, however, be so extended. The domicile of a corporation is customarily regarded as the place where it was incorporated, and the courts have given that meaning to the term as it is used in article 28(1) of the Convention. (*See Smith* v. *Canadian Pacific Airways, Ltd.* (2d Cir. 1971), 452 F.2d 798, 802; *Nudo* v. *Societe Anonyme Belge d'Exploitation de la Navigation Aerienne Sabena Belgian World Airlines* (E.D. Pa. 1962), 207 F. Supp. 191; *Karfunkel* v. *Compagnie Nationale Air France* (S.D.N.Y. 1977), 427 F. Supp. 971, 974.) Moreover, the structure of article 28(1), viewed as a whole, is also incompatible with the plaintiffs' claim. The article, in stating that places of business are among the bases of jurisdiction, sets out two places where an action for damages may be brought: the country where the carrier's principal place of business is located, and the country in which it has a place of business through which the particular contract in question was made, that is, where the ticket was bought. Adopting the plaintiffs' theory would at a minimum blur these carefully drawn distinctions by creating a third intermediate category. It would obviously introduce uncertainty into litigation under the article because of the necessity of having to determine, and without standards or criteria, whether the amount of business done by a carrier in a particular country was "regular" and "substantial." The plaintiffs'

request to adopt this basis of jurisdiction is in effect a request to create a new jurisdictional standard for the Convention.

The plaintiffs next contend that the tickets issued to them did not inform them of the limitations under article 28(1). The plaintiffs claim this was equivalent to a failure to advise them of the monetary limitation on liability contained in article 22, an omission which precludes a carrier from reliance on that limitation. *Lisi* v. *Alitalia-Linee Aeree Italiane* (2d Cir. 1966), 370 F.2d 508, *aff'd by an equally divided court* (1968), 390 U.S. 455, 20 L. Ed. 2d 27, 88 S. Ct. 1193.

Article 3(1)(e) requires a ticket to carry "a statement that the transportation is subject to the rules relating to liability established by this convention," and article 3(2) provides:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

The provision of article 28(1) limiting the places where a carrier may be sued are not provisions "which exclude or limit his liability," and the latter phrase refers only to the monetary ceiling on damages found in article 22. The Hague Protocol of 1955 confirmed such a reading of article 3(2) by amending that provision (which was then renumbered as paragraph (2)) so as to read:

> "The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of the Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22."

Even without this amendment by the Hague Protocol, however, courts have declined to extend article 3(2) of the Warsaw Convention to situations in which the information omitted from a ticket related to matters beyond the monetary liability ceilings of article 22. Thus, in *Molitch* v. *Irish International Airlines* (2d Cir. 1970), 436 F.2d 42, it was unsuccessfully contended that the failure to inform a passenger of the two years' limitations period specified in article 29(1) of the Convention barred reliance on that period. The court held that the limitations period was not "a provision which excludes or limits liability" within the meaning of section 3(2). (436 F.2d 42, 44.) Similarly in *Butler's Shoe Corp.* v. *Pan American World Airways, Inc.* (5th Cir. 1975), 514 F.2d 1283, the court held that a tariff provision specifying the time within which a notice of loss must be filed was not void as constituting a provision "relieving a carrier of liability" and thus void under article 23. As explained in *Lisi* v. *Alitalia-Linee Aeree Italiane* (2d Cir. 1966), 370 F.2d 508, 512-13, the purpose of requiring disclosure to a passenger that the amount of recovery may be limited if he should be killed or injured in an accident is to enable the prospective passenger to take protective measures such as taking out additional insurance. Having given an advantage to the carrier by reducing liability, it is understandable that the Convention should require that a passenger should be made aware of it.

We perceive no comparable reason, however, why the individual passengers here would have cared to know in which Convention country his action for damages must be brought, since the same damages limitation would apply in each. It was observed in *Molitch*, with respect to the

statute of limitations, that "[a] prospective passenger is unlikely to care about the length of the statute of limitations and it is difficult to conceive of any protective measures that he might take prior to boarding the plane were he notified of the limitation." (436 F.2d 42, 44.) We consider the same is true with respect to a restriction as to the countries in which suit must be brought.

The plaintiffs also argue that Air France waived the benefit of article 28 because it did not file a special appearance but appeared generally. We also reject this contention. Under section 20 of the Civil Practice Act. (Ill. Rev. Stat. 1977, Ch. 110, par. 20), a special appearance is a vehicle "for objecting to the jurisdiction of the court over the person of the defendant." Air France was properly served with process, and no question of personal jurisdiction over it is involved. Challenges to jurisdiction over the subject matter of an action are dealt with by other sections of the Act, namely sections 43(3) and 48(1)(a).

Lack of subject matter jurisdiction cannot be waived. Thus, in *People* v. *Sanitary District* (1904), 210 Ill. 171, this court held that the State's sovereign immunity under the 1870 Constitution could not be waived by the Attorney General's entry of an appearance for the State as a defendant. In *Werner* v. *Illinois Central R.R. Co.* (1942), 379 Ill. 559, it was held that a statutory limitation of the jurisdiction of a city court to those cases arising within the city could not be enlarged by the consent of the parties and "was not waived by defendant's appearance and participation in the trial." (379 Ill. 559, 566.) In *Crane Paper Stock Co.* v. *Chicago & Northwestern Ry. Co.* (1976), 63 Ill. 2d 61, 68, we recently reaffirmed the rule invoked in the *Werner* case.

The plaintiffs, without citation of any supporting decision, make two responses to the principle stated above The first is that the subject matter here is the general power of a circuit court to entertain "original jurisdiction of all justiciable matters" (Ill. Const. 1970, art. VI, sec. 9). We consider that this argument begs the question, for

what the Convention does is to remove from the general jurisdiction of the circuit courts those claims arising out of "international transportation" for which the circuit courts are, because of article 28(1), not suitable forums.

The principle is analogous to the statutory exclusion from circuit court jurisdiction of suits against the State, which must be brought in the Court of Claims (see section 8 of the Court of Claims Act (Ill. Rev. Stat. 1977, ch. 37, par. 439.8)), even though in the Court of Claims the amount recoverable is limited and many procedural rights enjoyed by a plaintiff in a circuit court proceeding are inapplicable. *Seifert* v. *Standard Paving Co.* (1976), 64 Ill. 2d 109; *Williams* v. *Medical Center Com.* (1975), 60 Ill. 2d 389.

The plaintiffs' second argument appears to accept the proposition that subject matter jurisdiction is not waivable, but seeks to avoid that result by asserting that what is involved here is not true subject matter jurisdiction but a separate category called "treaty jurisdiction."

On occasion a Federal court has referred to article 28(1) as establishing "treaty jurisdiction." (*See Smith* v. *Canadian Pacific Airways, Ltd.* (2d Cir. 1971), 452 F.2d 798, 801-02.) For purposes of the court's discussion, the term was coined in order to draw a distinction from the "power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case—jurisdiction in the domestic law sense." (452 F.2d 798, 800.) The court in *Smith* also held that article 28(1) did not refer to venue, as opposed to jurisdiction, a point with which the plaintiffs agree in their brief, where it is stated, "There is no 'venue' issue herein." *Smith* also pointed out the language of article 32 of the Convention prohibiting alteration of rules "as to jurisdiction." (452 F.2d 798, 801.) There is nothing in *Smith* to show a disposition to dilute or attenuate the nonwaiver rule which applies to subject matter jurisdiction.

Since 1938 there has been no provision for a special appearance in the Federal Rules of Civil Procedure (15 Wright, Miller & Cooper, Federal Practice and Procedure

sec. 3829, at 196 (1976).) The narrow question of waiver of article 28(1) by entry of a general appearance which the plaintiffs raise has not thus arisen in the Federal court decisions. The Federal courts, however, have repeatedly granted motions to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for want of jurisdiction because of the provisions of article 28(1). See *Smith* v. *Canadian Pacific Airways, Ltd.* (2d Cir. 1971), 452 F.2d 798; *Nudo* v. *Societe Anonyme Belge d'Exploitation de la Navigation Aerienne Sabena Belgian World Airlines* (E.D. Pa. 1962), 207 F. Supp. 191; *Karfunkel* v. *Compagnie Nationale Air France* (S.D.N.Y. 1977), 427 F. Supp. 971; *Butz* v. *British Airways* (E.D. Pa. 1976), 421 F. Supp. 127, *aff'd mem.* (3d Cir. 1977), 566 F.2d 1168.

The final contention of the plaintiffs as to article 28(1) of the Convention is that, if applicable, the article deprives them of rights guaranteed by the Constitution of the United States. The trial court, upon the denial of the defendants' motions to dismiss, expressed doubts as to constitutionality, but the validity of article 28(1) was not among the questions certified for review.

The plaintiffs do not cite any decision holding the Convention invalid, either with respect to article 28(1) or otherwise, nor indeed does their brief set forth the ground on which its validity is questioned here. Their brief only states, "Plaintiffs do not desire to waive this point but it would unduly lengthen this brief to argue the alleged unconstitutionality of Article 28(1)," and they simply refer this court to a portion of a brief filed in the trial court which is addressed to this issue. It would not be unreasonable to say that the plaintiffs by proceeding in this manner have waived their point as to unconstitutionality in this court under our Rule 341(e)(7) (58 Ill. 2d R. 341 (c)(7)), but we have nevertheless examined the trial court brief.

From that brief, it appears that the constitutional challenge asserted here rests only on the claim that the circuit court of Cook County, in the plaintiffs' words, "[i]s one of the few forums, perhaps the only one on this planet

where all three defendant airlines carry on business and are subject to process." From this, the plaintiffs assert, it follows that dismissal of this suit would deprive them of due process of law. The contention does not persuade. It is not unique to article 28(1) that a plaintiff may be unable to sue all defendants in a single action, whether because of lack of personal jurisdiction, venue problems, subject matter limitations on Federal or State court jurisdiction, or the like. The plaintiffs cite no authority for the proposition that such inability amounts to a deprivation of due process.

For the reasons given, we hold that the trial court was in error in denying the motion by Air France to dismiss it from the suit on the ground that suit was barred by the Warsaw Convention.

While the foregoing discussion disposes of the appeal by Air France, there remains to be considered the appeal by Singapore, which, since the complaint did not allege any injury to its own passengers, so as to make the Warsaw Convention applicable, based its motion solely on the ground that the doctrine of *forum non conveniens* required dismissal of the case.

Our holding that the plaintiffs' suit against Air France could not be brought in Cook County because of the Warsaw Convention would seem to diminish, if not eliminate, the suitability of Cook County as a forum for the plaintiffs. The dismissal of Air France from the suit removes the base of the plaintiffs' desire to retain Singapore in the circuit court of Cook County.

The single question presented as to Singapore in the trial court was described by that court as "whether the circuit court of Cook County is an improper forum to litigate this action." For us, on Singapore's appeal, the question is whether it was an abuse of discretion for the trial court to have denied Singapore's motion to dismiss on the ground of *forum non conveniens*. We will consider this question on Singapore's appeal to us. We state this because Singapore was never joined as a party to Air

France's original petition for a writ of *mandamus*, although to judge from its briefs Singapore assumes it was joined. Singapore refers to our order of May 25, 1978, as having granted it leave to join in the petition of Air France under Supreme Court Rule 381 (58 Ill. 2d R. 381). That order, however, simply granted Singapore leave to transfer its Rule 308 interlocutory appeal from the appellate court to this court and to consolidate the cause with Air France's petition for *mandamus* which was pending before us and with its previously transferred appeal.

The doctrine of *forum non conveniens* was succinctly described in *Adkins* v. *Chicago, Rock Island & Pacific R.R. Co.* (1973), 54 Ill. 2d 511, 514:

> "*Forum non conveniens* is a doctrine that is founded in considerations of fundamental fairness and sensible and effective judicial administration. In the application of these basic considerations a court may decline jurisdiction of a case 'even though it may have proper jurisdiction over all parties and the subject matter involved' (*Whitney* v. *Madden* (1948), 400 Ill. 185, 189, *cert. denied*, 335 U.S. 828, 93 L. Ed. 382, 69 S. Ct. 55), whenever it appears that there is another forum that can better 'serve the convenience of the parties and the ends of justice.' (*Lonergan* v. *Crucible Steel Co. of America* (1967), 37 Ill. 2d 599, 606.)"

Whether particular facts and circumstances warrant dismissal of a case on the ground of *forum non conveniens* rests primarily within the discretion of the trial court. The court's decision will be reversed on review if it can be said that in deciding as it did there was an abuse of discretion. *Fender* v. *St. Louis Southwestern Ry. Co.* (1971), 49 Ill. 2d 1, 4; *Lonergan* v. *Crucible Steel Co. of America* (1967), 37 Ill. 2d 599, 606; *Cotton* v. *Louisville & Nashville R.R. Co.* (1958), 14 Ill. 2d 144, 159; *Whitney* v. *Madden* (1948), 400 Ill. 185, 190.

A comprehensive statement of factors to be weighed in considering dismissal of a case under *forum non*

conveniens is found in the often cited case of *Gulf Oil Corp.* v. *Gilbert* (1947), 330 U.S. 501, 508-09, 91 L. Ed. 1055, 1062-63. 67 S. Ct. 839, 843:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. • • •
>
> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. • • • The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum 'vex' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case

in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

The only connection between the forum in which the suit was brought, the circuit court of Cook County, and Singapore is the circumstance that Singapore, which is not an American corporation, maintains a sales office in Illinois, although it operates no passenger flights into or out of the United States. All of the plaintiffs are nonresident aliens, and no plaintiff purchased a ticket in the United States or was ticketed to a final destination in this country. The occurrences giving rise to this suit took place in, or en route to, Bahrain, Greece, Libya, and Uganda. The substantive law which would at a trial be applied to the plaintiffs' claims would be that of those, and possibly of other, foreign countries. Intricate questions involving foreign law may have to be resolved. (*Cf. Marchlik* v. *Coronet Insurance Cn.* (1968), 40 Ill. 2d 327.) None of the conduct of which the plaintiffs complain occurred in Illinois. It is difficult, indeed, to assume a situation in which the parties and operative facts of a case have a lesser connection with the forum of Cook County.

A motion to dismiss on the ground of *forum non conviens* presupposes that more than one court can be used as a forum. (*Adkins* v. *Chicago, Rock Island & Pacific R.R. Co.* (1973), 54 Ill. 2d 511, 515.) Singapore has suggested the United Kingdom as an alternative forum; all of the defendants operate commercial flights into London and are amenable to service of process there. Singapore also points out that the courts of the United Kingdom are thousands of miles closer to all sources of proof; discovery has already commenced in London, Singapore states, and at least one so-called protective suit has been filed in England by one of the plaintiffs in this suit. Of course, Singapore and Air France operate flights into and out of Greece, where the hijackers alighted from one carrier's plane and boarded the other's; and Singapore, Air France and Gulf all operate flights into and out of

France and the Netherlands. Any of these potential forums would provide, in varying degrees, greater "relative ease of access to sources of proof," and lesser "cost of obtaining attendance of willing witnesses" than a forum in the center of the United States. *Gulf Oil Corp.* v. *Gilbert* (1947), 330 U.S. 501, 508, 91 L. Ed. 1055, 1062, 67 S. Ct. 839, 843.

We must take notice, too, of the crowded condition of the dockets of the circuit court of Cook County, "congested with litigation having a closer connection to it than the cause here concerned" (*Marchlik* v. *Coronet Insurance Co.* (1968), 40 Ill. 2d 327, 336), and the long delays between suits filed and jury verdicts obtained. See *Fender* v. *St. Louis Southwestern Ry. Co.* (1971), 49 Ill. 2d 1, 6.

Too, as we observed earlier in this opinion, the Supreme Court has stated: "Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." (*Gulf Oil Corp.* v. *Gilbert* (1947), 330 U.S. 501, 508-09, 91 L. Ed. 1055, 1062, 67 S. Ct. 839, 843.) This factor and the now overburdened condition of the dockets in the circuit court of Cook County which we have just described must be considered important in this case, which involves an incident which occurred thousands of miles from the forum, and which does not involve a single party who is a citizen of Illinois or, for that matter, of the United States.

Referring to suits by noncitizen and nonresident plaintiffs based on events that occurred outside the United States and that involved the application of foreign law, courts have allowed motions for dismissal on the ground of *forum non conveniens* in the absence of special and unusual circumstances. In *Fitzgerald* v. *Westland Marine Corp.* (2d Cir. 1966), 369 F.2d 499, the court affirmed the dismissal, on grounds of *forum non conveniens,* of a negligence action brought by a public administrator on behalf of the estates of 31 Spanish nationals and one Yugoslavian national against corporations of Japan and British Columbia, and a New York corporation, against whom suit

was dismissed on other grounds. In answer to the plaintiffs' contention that New York was the only jurisdiction where all three defendants could be sued at once, the court noted that the complaint against the New York corporation had already been properly dismissed and that no showing had been made of the unavailability of another forum in which the two remaining defendants could be sued. The reasons given for finding in favor of the defendants were that nearly all relevant witnesses to the main issue resided in Japan, no compulsory process for witnesses was available, the cost of bringing witnesses to New York would be exorbitant, New York had little connection with the accident, which occurred off the coast of Alaska, the resolution of legal questions would entail interpretation of Japanese and Canadian law, and all deceased crewmen, with one possible exception, were foreigners.

Vanity Fair Mills, Inc. v. *T. Eaton Co.* (2d Cir. 1956), 234 F.2d 633, *cert. denied* (1956), 352 U.S. 871, 1 L. Ed. 2d 76, 77 S. Ct. 96, involved a trademark-infringement and unfair-competition action. The suit was brought against Canadian defendants on a cause of action which arose in Canada, and it presented Canadian trademark issues which would be governed by Canadian trademark law. The court affirmed a dismissal of the suit on the grounds of *forum non conveniens* as to the above-described portion of the complaint, even though the plaintiff was an American corporation.

Among the many cases in which motions for dismissal were allowed on the ground of *forum non conveniens* where the factors present resembled those we are considering here are the following: *Spencer* v. *Alcoa Steamship Co.* (E.D.N.Y. 1963), 221 F. Supp. 343, *aff'd* (2d Cir. 1963), 324 F.2d 957; *Heitner* v. *Zim Israel Navigation Co.* (S.D.N.Y. 1957), 152 F. Supp. 3; *To Po Nyo* v. *J. Fritz Co.* (1971), 38 App. Div. 2d 528, 326 N.Y.S.2d 868, *appeal dismissed* (1972), 30 N.Y.2d 772, 284 N.E.2d 582, 333 N.Y.S.2d 430; *Lambiris* v. *Neptune Maritime Co.* (1971), 38 App. Div. 2d 528, 326 N.Y.S.2d 862; *Hernandez* v. *Cali, Inc.* (1969), 32 App. Div. 192, 301 N.Y.S.2d 397, *aff'd mem.* (1968), 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625; *Carey* v. *Southern Peru Copper Corp.* (1968), 20 App. Div. 2d 744, 287 N.Y.S.2d 599; *Gilchrist* v. *Trans-Canada Air Lines* (1966), 27 App. Div. 524, 275 N.Y.S.2d 394; *Faulkner* v. *S.A. Empresa de Viaco Airea Rio Grandense* (Fla. App. 1969), 222 So.2d 805. See also *Canada Malting Co.* v. *Paterson Steamships, Ltd.* (1932), 285 U.S. 413, 423, 76 L. Ed. 837, 842-43, 52 S. Ct. 413; *Moutzouris* v. *National Shipping & Trading Co.* (S.D.N.Y. 1961), 196 F. Supp. 482; *Monteiro* v. *Sociedad Mar. San Nicolas, S.A.* (S.D.N.Y. 1959), 175 F. Supp. 1, *rev'd on other grounds* (2d Cir. 1960), 280 F.2d 568, *cert. denied* (1960), 364 U.S. 915, 5 L. Ed. 2d 228, 81 S. Ct. 272; *De Sairigne* v. *Gould* (S.D.N.Y. 1949), 83 F. Supp. 270, 272, *aff'd* (2d Cir. 1949), 177 F.2d 515, *cert. denied* (1950), 339 U.S. 912, 94 L. Ed. 1338, 70 S. Ct. 571.

The cases offered by the plaintiffs to support their contention that the case should be retained in the circuit court of Cook County involved circumstances importantly different from those here. In *Varkonyi* v. *S.A. Empresa De Viacao Airca Grandense* (*Varig*) (1968), 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670, the Court of Appeals of New York ordered reconsideration of an order dismissing on the ground of *forum non conveniens,* but the court did so in the light of "specia and unusual circumstances" (22 N.Y.2d 333, 338, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 674). Among those special and unusual circumstances it found were that other actions against the defendants based on the same occurrence were pending in Federal and State courts in New York. It had been agreed by the parties that pretrial discovery would be consolidated among those cases to conserve time and expense. Another circumstance was that there was an American defendant, a manufacturer, and the issue of the manufacturer's liability was inseparably connected with the issue of the airline's faulty operation and maintenance. *Eck* v. *United Arab Airlines, Inc.* (2d Cir. 1966), 360 F.2d 804, simply did not involve *forum non conveniens.* The holding of the court was that the trial court had

jurisdiction under article 28(1) of the Warsaw Convention. The plaintiff, whose residence was in California, had purchased her ticket in California through an agent of the defendant carrier.

The other cases the plaintiffs cite (*Motor Distributors* v. *Olaf Pedersen's Rederi A/S* (5th Cir. 1956), 239 F.2d 463, *cert. denied* (1957), 353 U.S. 938, 1 L. Ed. 2d 750, 77 S. Ct. 816, and *Kloeckner Reederei Und Kohlenhandel, G.M.B.H.* v. *A/S Hakedal* (2d Cir. 1954), 210 F.2d 754, *appeal dismissed* (1954), 348 U.S. 801, 99 L. Ed. 633, 75 S. Ct. 17) were cases involving collisions on the high seas and questions of Federal admiralty jurisdiction. *Motor Distributors* simply acknowledged the right of a libelant possessing a maritime lien to proceed in the jurisdiction where the vessel was found, and *Kloeckner* recognized the right of a libelant to sue an alien defendant where his property could be attached.

We consider that the circuit court of Cook County is a distant, uninvolved and inappropriate forum in relation to the parties and incidents that occurred thousands of miles from Illinois. There are other forums as between the plaintiffs and Singapore (and the other defendants as well) that would better serve the accomplishment of justice, the convenience of the parties, and the courts. The trial court abused discretion in denying the motion of Singapore to dismiss on the ground of *forum non conveniens.*

For the reasons given, the order of the circuit court denying the motions of Air France and of Singapore to dismiss are vacated and the cause is remanded to the circuit court of Cook County with directions to dismiss the action as to Air France and Singapore. In view of the disposition we make it is unnecessary to consider the petition of Air France for a writ of *mandamus;* the petition is accordingly dismissed.

50584—Petition dismissed.

50769—Order vacated; cause remanded, with directions.

APPENDIX B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

EITAN ARONOWITCH, et al,

Plaintiffs,

v.

COMPAGNIE NATIONALE AIR FRANCE, et al,

Defendants.

No. 77 L 5681

MOTION TO DISMISS

Singapore Airlines, Ltd., by Mendes & Mount and Heineke & Schrader, its attorneys, respectfully moves this Honorable Court to dismiss the above-captioned action pursuant to the doctrine of forum non conveniens for the reason that another readily available forum, specifically the United Kingdom, can far better serve the convenience of all the parties and the ends of justice;

And in support thereof, Singapore Airlines, Ltd. respectfully submits:

I. A British court, being much more familiar with the substantive law applicable to the claims giving rise to the subject action, can better afford all parties a fair trial.

Singapore Airlines, Inc. does not suggest that this Honorable Court would not afford all parties an impartial trial.

Nevertheless, in the context of the decision of the Illinois Supreme Court in *Adkins* v. *Chicago Rock Island and Pacific Railroad Company,* 54 Ill. 2d 511 (1973), fairness must involve not only impartiality but also familiarity with the applicable substantive law.

It is self-evident from the facts set forth in the complaint, as already thrice amended, that the substantive law of Illinois will have no bearing on this litigation.

However, as many of the acts alleged in the complaint took place in Uganda, the destination of the hijacking, the substantive law of that nation may well apply.

Uganda being a commonwealth nation, British judges would be better qualified to interpret and apply the laws of that country.

And, as plaintiffs have opted to bring their purported action under a common law system in Illinois, they should be satisfied with the United Kingdom as an alternative forum.

Accordingly, Singapore Airlines, Ltd. respectfully submits that a British court would be in a superior position to determine the rights of the parties under the applicable substantive law and thus better serve the ends of justice for all parties.

II. A British court would be far more convenient to the witnesses and parties.

Obviously, no single forum can be immediately convenient to all parties and potential witnesses in this geographically extensive litigation.

That fact, however, certainly does not warrant total abandonment of the principle of convenience by exporting litigation to what is unquestionably among the least convenient forums.

As appears in the complaint, as thrice amended, none of the events giving rise to this litigation occurred in the Western Hemisphere, let alone anywhere near the State of Illinois.

Further, none of the parties are citizens of this country, let alone of this State; and it must, therefore, be assumed that treating physicians and other witnesses to the issues

of alleged damages will not be readily available near this forum.

While, as stated above, no forum can be ideally convenient for all purposes, it is obvious that a British court will be far more convenient than this Honorable Court which is located at least 5,000 miles from the nearest of those locations at which any of the events, as referenced in the complaint, as thrice amended, are alleged to have occurred.

The United Kingdom is thousands of miles closer than Illinois to where the parties reside and to those countries in which the events leading to the hijacking, and the hijacking itself, took place. And all of the defendants do business in the United Kingdom and operate commercial flights into and out of it.

From Paris, headquarters of Air France and base for the subject flight crew, London is less than an hour's flight. London is also served by major flag carriers from all countries in which parties and witnesses reside, and from all the places where possible relevant events occurred—Abu Dhabi, Bahrein, Athens and Uganda.

Plaintiffs have already commenced discovery in London. And the decedent of the lead plaintiff, Dora Bloch, on whose behalf that discovery is being conducted, was a resident of Great Britain. Further, as evidenced by a copy of the Writ In the High Court of Justice, which is hereto attached as Exhibit A, the administrator of her estate has commenced an action there seeking damages for her wrongful death.

III. To permit these eighty-five plaintiffs to export this litigation to Cook County, Illinois, will place an unconscionable burden upon the taxpayers and residents of this country.

This Honorable Court has, quite properly, always opened its doors to all litigants to the fullest extent consistent with the guiding principles of due process,

This litigation, however, is so totally unrelated to this forum, and if allowed to remain will place such a burden upon the taxpayers and residents of this country, that to permit these eighty-five alien litigants to further congest the docket of the Circuit Court of Cook County will deprive Illinois residents of due process.

Article 1 §12 of the Illinois Constitution reiterates the concern of this State that *prompt* justice be afforded by its courts.

This Honorable Court must never lose sight of the fact that thousands of local residents, who by virtue of the requirements of jurisdiction, venue and the like, cannot transfer their litigation elsewhere, can only seek justice here.

While we do not suggest that this Honorable Court should ever close its doors to non-resident parties who are properly entitled to bring their actions in this forum, to further congest the docket of this court with this litigation will deprive all litigants who may properly come before this court with their inalienable right of due process.

IV. Plaintiffs' prefatory allegations are not relevant to the issues of the doctrine of forum non conveniens.

By the subparagraph of their fourth prefatory paragraph, plaintiffs seek to bootstrap their litigation into this forum through totally specious arguments.

Firstly, plaintiffs allege that this is one of the *few* jurisdictions in which all parties carry on business and are subject to jurisdiction.

Even assuming, arguendo, that the sales office maintained by Singapore Airlines, Ltd. in Chicago, Illinois, constitutes sufficient contact for jurisdiction, plaintiffs do not suggest that this is the *only* forum available.

The total number of forums which may be available is not relevant to the doctrine of forum non conveniens as long as there is more than one.

As shown above, the courts of the United Kingdom are readily available to plaintiffs and, for the reasons shown, would far better serve the convenience of the parties and the ends of justice.

Secondly, plaintiffs' praise of the discovery rules of this court is not relevant absent a showing of some specific prejudice to plaintiffs in the otherwise far more convenient forum.

Upon dismissal of this action by this Honorable Court, Singapore Airlines, Ltd. is prepared to defend this lawsuit, whether as sole defendant or with others, in the United Kingdom.

For each and all of the above reasons, and on such other grounds as this Honorable Court may deem appropriate, Singapore Airlines, Ltd. respectfully urges that this Honorable Court refuse to import this burdensome and totally alien litigation by dismissing plaintiffs' action pursuant to the well-established doctrine of forum non conveniens.

SINGAPORE AIRLINES, LTD.

By /s/ WILLIAM H. SCHRADER
One of Its Attorneys

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(212) 344-7100
Of Counsel:

HEINEKE & SCHRADER
135 South LaSalle Street
Chicago, Illinois 60603
(312) 236-6655

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

William H. Schrader deposes that he is a partner in the firm of Heineke & Schrader, attorneys for Singapore Airlines, Ltd., a defendant herein; that the foregoing motion to dismiss is not made for the purpose of harrassment or delay, but that justice be done; and he certifies that in his opinion the motion is well founded in point of law.

/s/ William H. Schrader

SUBSCRIBED AND SWORN to
before me on August 12, 1977.
/s/ Sue Jones, *Notary Public*

CERTIFICATE OF MAILING

William H. Schrader hereby certifies that he is a partner in the firm of Heineke & Schrader, attorneys of record for Singapore Airlines, Ltd., a defendant herein; that he has served a copy of the foregoing motion to dismiss upon all attorneys of record by depositing on August 12, 1977, in the United States Mail Chute at 135 South LaSalle Street, Chicago, IL 60603, a true and correct copy thereof in a sealed envelope, first class postage prepaid, addressed respectively to each of the said attorneys of record.

/s/ William H. Schrader

Exhibit A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
1977—H.—No. 2198

Between

ILAN HARTUV

Plaintiff

and

FARIK MINAWA

1st Defendant

IDI AMIN DADA

2nd Defendant

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

To Farik Minawa, Esq.,
of State Research Bureau, Kampala, Uganda

And to Idi Amin Dada, Esq.,
of State Research Bureau, Kampala, Uganda

in the

WE COMMAND YOU that within 14 days after the service of this Writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of

Ilan Hartuv

;

and take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

Witness, FREDERICK, BARON ELWYN JONES,
, Lord High Chancellor
of Great Britain, the 17th day of May, 1977.

Note—This Writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendant may enter an appearance in person or by a Solicitor either (1) by handing in the appropriate forms, duly completed, at the Central Office, Royal Courts of Justice, Strand, London, WC2A 2LL or (2) by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for ??? with an addressed envelope, foolscap size, to the Clerk of Accounts, Vote Office, Royal Courts of Justice, Strand, London, WC2A 2LL.

THE PLAINTIFF'S CLAIM is for damages as Administrator of the estate of Mrs. Dora Bloch, deceased, under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of the death of the deceased on or about 4th July 1976 at Mulago General Hospital, Kampala, Uganda which was caused by the negligence or deliberate act or acts of the Defendants, their servants or agents.

The plaintiff is a person resident outside the scheduled territories as defined by the Exchange Counsel Act 1947 and resides at the address shown below.

This Writ was issued by BINDMAN & PARTNERS, of 1 Euston Road, London, NW1

Solicitors for the said Plaintiff, whose address is Bertram Bloch, 16 Mendeley Street, Herzelia B, Israel.

Indorsement as to service.

This Writ was served by me at

on the Defendant

on , the day of 19 .

Indorsed the day of 19 .

(Signed).....

(Address).....

APPENDIX C

In The

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department, Law Division

EITAN ARONOWITCH, et al.,

Plaintiffs,

v.

COMPAGNIE NATIONALE AIR FRANCE, also known as AIR FRANCE, a corporation; SINGAPORE AIRLINES, LTD., also known as SINGAPORE AIRLINES; GULF AIR LINES, also known as GULF AVIATION CO., LTD., also known as GULF AIR COMPANY, a corporation,

Defendants.

No. 77 L 5681

Republic of France)
City of Paris)
) ss.
Embassy of the United)
States of America)

ANDRE GARNAULT, being duly sworn, deposes and says:

I am a native born citizen of France. I received my legal training at the University of Paris and I have been practicing as an attorney in France since 1925. My office address is: 17 Avenue de Lamballe, 75016 PARIS. I am General Counsel for AIR FRANCE and have been so since this company was incorporated in 1933. I have represented the French Government at the Chicago Conference in 1944, at the Hague Conference, at the Geneva Conference, and at the Gautemala City Conference. I

have been President and I am presently a member of the International Civil Aviation Organization.

I am familiar with the complaint in the above-captioned action and all of the affidavits submitted on behalf of AIR FRANCE or its motion to dismiss this complaint for lack of subject matter jurisdiction in this court and upon the ground of *Forum Non Conveniens.*

Fifteen of the passengers mentioned as plaintiffs in the complaint are French nationals and two airlines mentioned in the complaint, SINGAPORE AIRLINES and GULF AIR, are subject to suit in the French courts by all fifteen of the French nationals mentioned in the complaint by virtue of article 14 of the French Civil Code, which provides as follows:

Article 14:

"L'etranger, meme non resident en France, pourra etre cite devant les tribunaux francais, pour l'execution des obligations par lui contractees en France avec un Francais; il pourra etre traduit devant les tribunaux de France, pour les obligations par lui contractees en pays etranger envers des Francais."

This article is applicable whenever no other French statute or international convention applies which is the case here.

/s/ Andre Garnault
Andre Garnault

Sworn to before me this
11th day of October 1977.
/s/ Louis J. Link

Consul of the United States of America

Supreme Court, U. S.
FILED
MAR 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1337

THE HONORABLE LOUIS J. GILIBERTO, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, ET AL., EITAN ARONOWITCH, ET AL.,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

RESPONDENT AIR FRANCE'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Transportation by Air), 49 Stat. 3000 *et seq.* (1934) .....*passim*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1337

THE HONORABLE LOUIS J. GILIBERTO, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, ET AL., EITAN ARONOWITCH, ET AL.,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

RESPONDENT AIR FRANCE'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Counterstatement

One of the surprising aspects of petitioners' lengthy "brief" in support of the petition for a writ of certiorari is that it extends over seventeen pages before even discussing the alleged legal issues involved. Nine of these seventeen pages are devoted to an extended recitation of the facts of the hijacking of June 27, 1976 and the nature of the treatment accorded to petitioners during their incarceration at Entebbe. While such discussion might have some import if the hijackers or the government of Uganda were before this Court, it has no relevance whatsoever with respect to petitioners' claims against the respondents. The result is that petitioners' brief is impermissibly long, and

in flagrant violation of Rule 23 (1.(c) and (e); Rule 23(4); Rule 40 1.(d)(1), and (f); and Rule 40(5) of the Rules of this Court.

As remarkable as petitioners' "brief" may be for what it does contain, it is even more remarkable for what it does not contain. Nowhere in petitioners' seventy-six pages is there any mention of the fact that actions have been filed against Air France in either Israel, France or Canada on behalf of *all* of the passengers on the hijacked Air France aircraft who are involved in this petition. In each instance, these passengers, who are all non-residents of the United States, have filed suit against Air France in their country of citizenship. All of such actions were filed by petitioners shortly before the running of the two-year prescriptive period set forth in Article 29 of the Warsaw Convention [49 Stat. Part 2—3021]. A complete list of these passengers on Air France flight 139 of June 27, 1976 who have brought suit against Air France in the courts of Canada, France and Israel accompanies this brief as "Appendix A". Accordingly, contrary to the false impression created in the petition, the decision of the Illinois Supreme Court dismissing petitioners' claims has not deprived petitioners of forums in which to litigate their alleged claims against respondent Air France arising out of the hijacking.

Question Presented

Should this Court review a decision of the Supreme Court of Illnois which is in complete accord with United States authority as to the applicability of the Warsaw Convention to claims arising out of aircraft hijackings, as to the interpretation of the permissible forums for suit enumerated in Article 28 of the Convention [49 Stat. Part 2(1)-3020], and as it relates to the Illinois doctrine of *forum non conveniens?*

POINT I

All of petitioners' claims against respondent Air France arising out of the hijacking to Entebbe are exclusively governed by the conditions and limits set forth in the Warsaw Convention.

In Point I of their brief in support of the petition for a writ of certiorari, petitioners allege that respondent Air France argued before the Illinois Supreme Court, and that court subsequently held, that petitioners were and remained "passengers" of Air France at all times, including the seven day period while they were imprisoned in Entebbe, Uganda. This assertion is a complete misstatement not only of Air France's argument before the Illinois Supreme Court, but of the express holding of that court.

The scope of an air carrier's liability for deaths or injuries sustained by passengers in international transportation is set forth in Article 17 of the Warsaw Convention (49 Stat. Part 2—3018):

> *"Article 17*
>
> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injuries suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Petitioners' "passenger" argument is apparently based upon the allegation that many of the injuries and deaths occurred following petitioners' disembarkation from Air France's aircraft at Entebbe. As the clear wording of Article 17 demonstrates, however, the applicability of this Article depends *not* on the location of the plaintiffs' *injuries,* but on the location of the "accident" causing the

injuries. As long as the accident causing the injuries takes place "on board the aircraft or in the course of any of the operations of embarking or disembarking", *all* injuries which flow from the accident are covered by Article 17 *regardless* of the particular location where these injuries occur. In this action, the "accident" constitutes the hijacking of Air France Flight 139, which hijacking obviously occurred while petitioners were on board Air France's aircraft. Accordingly, Article 17 of the Warsaw Convention comprehends all of the petitioners' claims for injuries and damages caused by that "accident". The common law question of whether the passenger/carrier relationship continued to exist after petitioners' disembarkation from Air France's aircraft is, therefore, entirely irrelevant to the determination of whether their claims against Air France are governed by the Warsaw Convention. In discussing petitioners' argument relating to the non-applicability of the Warsaw Convention to petitioners' injuries incurred after disembarkation from Air France's aircraft at Entebbe, the Illinois Supreme Court correctly interpreted the scope of Article 17 of the Warsaw Convention as follows (74 Ill. 2d 90, 383 N.E.2d at 981):

> "From more specific allegations made later in the complaint it appears that some, at least, of the threats and physical injuries to which the plaintiffs were allegedly subjected may not have taken place while they were aboard the plane but rather while they were kept in detention at Entebbe. Assuming that to be the case the Warsaw Convention would not thereby be rendered inapplicable to this suit. Its applicability, under Article 17, depends upon the place where the 'accident,' rather than the resulting injuries, occurred, and the 'accident,' as already noted, consisted of the hijacking itself."

In support of its holding relating to the applicability of the Warsaw Convention to the claims arising out of

the hijacking to Uganda, the Illinois Supreme Court cited a number of recent federal court decisions which have held the Warsaw Convention applicable to claims arising out of aircraft hijackings and other intentional acts of terrorism committed in the course of international flights, including *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); and *Karfunkel* v. *Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977). 74 Ill. 2d 90, 383 N.E. 2d at 980.

In an attempt to discredit the Illinois Supreme Court's reliance on the above-cited cases, petitioners claim that the facts in this case are "materially different from the facts in any of the decisions cited by the Illinois Supreme Court." This assertion is negated by the fact that the last decision cited above, namely *Karfunkel* v. *Compagnie National Air France*, arose out of this *very same hijacking*. In *Karfunkel*, Judge Inzer Wyatt of the United States District Court for the Southern District of New York dismissed the claims of the two Karfunkel passengers on Air France Flight 139 of June 27, 1976 upon the ground that that court was not a permissible forum for their action against Air France pursuant to Article 28 of the Warsaw Convention. Unlike any of the present petitioners, the plaintiffs in *Karfunkel* were United States citizens, a fact which illustrates that the citizenship of a plaintiff may *not* be a relevant factor in determining the suitability of a particular forum under Article 28.

In holding that all of the *Karfunkel* claims against Air France were subject to the terms of the Warsaw Convention and thus barred by the provisions of Article 28, Judge Wyatt placed primary reliance upon the earlier decision of that court in *Husserl* v. *Swiss Air Transport Co., supra*. *Husserl* arose out of a hijacking in which a Swissair aircraft was diverted to a desert airport in Jordan where the

passengers were forced to stay in the aircraft for approximately twenty-four hours and were then confined to a hotel in Amman, Jordan for another four days. In commenting upon this set of facts, Judge Wyatt in *Karfunkel* observed that *Husserl* involved "a hijacking in all respects indistinguishable from that at bar." 427 F.Supp. at 975. Perforce, then, the facts in *Husserl* are equally "indistinguishable" from the facts of the hijacking involved herein.

Since the Illinois Supreme Court was clearly correct in holding that the Warsaw Convention is applicable to *all* of petitioners' claims against respondent Air France for injuries arising out of the hijacking of June 27, 1976, it is apparent that these claims are exclusively governed by the conditions and limits established by the Warsaw Convention including (49 Stat. Part 2—3020):

> *"Article 24*
>
> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

POINT II

No authority exists for the interpretation of the word 'domicile' in Article 28 of the Warsaw Convention asserted by petitioners.

Petitioners' primary grounds for seeking review by this Court of the decision of the Illinois Supreme Court, as it relates to the scope of Article 28 of the Warsaw Convention, is their argument that the Illinois Supreme Court

erred in holding that the word "domicile" contained in Article 28 does not mean any country in which the airline carries on business on a "regular and substantial" basis.

Petitioners are unable to cite any authority for such an interpretation of the word "domicile". The reason for this lack of support is that no one has ever had the temerity to suggest such a meaning. The fact that no party, despite the multitude of United States decisions concerning the interpretation of Article 28, has argued for the meaning of "domicile" proposed by the petitioners is ample demonstration of the absurdity of this argument. On those occasions where courts have commented upon the "domicile" provision of Article 28, they have unequivocally stated that a corporation is domiciled at its place of incorporation, a proposition previously considered not worthy of even contesting.

The leading case in the United States concerning the interpretation of Article 28 of the Warsaw Convention is *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). That action involved a claim for personal injuries sustained by a United States citizen on a flight of Canadian Pacific, an airline incorporated in Canada, between Vancouver, British Columbia and Tokyo, Japan. The plaintiff's contract of carriage had been purchased in Vancouver. The facts of the *Smith* action are therefore comparable to the facts of petitioners' claims against Air France, in that the plaintiff in *Smith* was suing a foreign airline for personal injuries sustained outside of the United States, on a contract of carriage which did not involve the United States as a final destination and which had not been purchased in the United States. As with petitioners herein, the only basis upon which the plaintiff in *Smith* could allege jurisdiction in his action brought in the United States District Court for the Southern District of New York was that Canadian Pacific maintained a ticket office in that jurisdiction and was generally sub-

ject to service of process therein. In *Smith,* the Second Circuit dismissed plaintiff's action for lack of jurisdiction under Article 28 of the Warsaw Convention. In its discussion of the four forums enumerated in Article 28, the Second Circuit held as follows with respect to the meaning of the "domicile" forum (452 F.2d at 802, emphasis supplied):

> "The domicile of Canadian Pacific Airways is in Canada, where it is incorporated, a *fact* not disputed by [plaintiff] appellee."

The Second Circuit then went on to specifically hold, in discussion of a previous decision of that court in *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804 (2d Cir. 1966), that the presence of the defendant airline in the jurisdiction generally, without any other United States contacts with the particular contract of carriage, would *not* support jurisdiction under Article 28 (452 F.2d at 803):

> "In *Eck,* the ticket for an international flight was purchased in Oakland, California for a Switzerland-Sudanese Republic trip. Relying on the purchase of the ticket at a site *within* the United States, through an agency of the carrier, *plus* the existence of a regular ticketing and booking office within the United States, this court concluded that Article 28(1) was satisfied. 360 F.2d at 814-815. *Eck* quite clearly did not hold that suit in the United States would be proper where the ticket was purchased outside the United States and no United States contacts, including but not limited to interline or intraline ticketing arrangements, existed beyond the presence of a ticketing and booking office of the carrier-defendant."

Numerous other cases have ruled that an airline's domicile for the purposes of Article 28 is its place of incorporation. *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804, 809 (2d Cir. 1966); *Butz* v. *British Airways,* 421 F.Supp. 127,

131 (E.D.Pa. 1976), *aff'd mem.,* 566 F.2d 1168 (3d Cir. 1977); *Karfunkel* v. *Compagnie Nationale Air France,* 427 F.Supp. 971, 974 (S.D.N.Y. 1977) (in which the attorneys who are co-counsel to petitioners herein, in an action arising out of the same hijacking, conceded that the domicile of Air France is its place of incorporation); *Vergara* v. *Aeroflot "Soviet Airlines",* 390 F.Supp. 1266, 1269 (D. Neb. 1975); *Kahn* v. *Compagnie Nationale Air France,* 9 Avi. 17, 107 (S.D.N.Y. 1964); *Nudo* v. *Societe Anonyme Belge d'Exploitation, Etc.,* 207 F. Supp. 191, 192 (E.D. Pa. 1962); *Galli* v. *Re-Al Brazilian Int. Airlines,* 29 Misc.2d 499, 500, 211 N.Y.S.2d 208, 209 (Sup. Ct., Queens Co. 1961).

Petitioners' asserted interpretation of "domicile" would render meaningless Article 28 of the Warsaw Convention by reducing the question of jurisdiction under the Convention to a strictly local matter of *in personam* jurisdiction. It would mean that the United States Court of Appeals for the Second Circuit in *Smith* v. *Canadian Pacific Airways, Ltd., supra,* and numerous other courts, had wasted their judicial time by considering Article 28 since they could have merely accepted jurisdiction in those cases based on consideration of *in personam* requirements. The Illinois Supreme Court clearly recognized the incompatibility of petitioners' interpretation of the "domicile" forum with the jurisdictional scheme of Article 28 of the Warsaw Convention when that court observed that "plaintiffs' request to adopt this basis of jurisdiction is in effect a request to create a new jurisdictional standard for the Convention." 74 Ill. 2d 90, 383 N.E.2d at 981.

Petitioners, unable to find any United States authority for their proposed interpretation of the "domicile" forum contained in Article 28, make reference to the fact that in certain foreign jurisdictions and treatises, the word "domicile" employed in the official French text of Article 28 has been interpreted as "ordinarily resident". However, the petitioners have cited this difference in translation in a

vacuum, and have come forth with *no authority* to indicate that "ordinarily resident" would be given any different interpretation by United States courts than "domicile" has been. In fact, examination of the law of the United Kingdom, wherein "domicile" in Article 28 has been translated to mean "ordinarily resident", reveals that this translation only serves to support the interpretation of the word "domicile" that has been announced by United States courts. The leading English treatise on air law, and indeed one of the leading treatises in the world on this subject, is Shawcross and Beaumont, *Air Law.*

In their Fourth Edition (1977), Shawcross and Beaumont succinctly explain the meaning of "ordinarily resident" in the following manner:

> "I. WHERE THE CARRIER IS ORDINARILY RESIDENT.
>
> 439. One of the four bases of jurisdiction applicable to actions for damages under the Act is that the court has jurisdiction 'where the carrier is ordinarily resident.' The notion of ordinary residence is more often used in relation to individuals; but the carrier will generally be a corporation, for which the notion is inappropriate. In tax cases, it has been held that a company is resident 'where the central management and control actually abides;' that a company can be resident in two or more countries, provided that central management and control is divided between those countries. It seems likely that the English courts would adopt a similar approach in the present context, so that in almost every case the question will be where does the board of directors have its seat."

Shawcross and Beaumont, *Air Law,* Fourth Ed., 1977, Vol. 1 at 413. It is beyond dispute that respondent Air France is a French corporation, primarily owned by the French

government, with its headquarters in Paris. The "central management and control" of Air France undeniably abides in France. Examination of the law of a jurisdiction which has interpreted "domicile" to mean "ordinarily resident", therefore, serves to underscore the complete lack of authority for the interpretation of the word "domicile" in Article 28 expounded by petitioners.

As a final attempt to submit some "authority" to this Court for the interpretation of "domicile" that they propose, petitioners have resorted to "authority" of their own making, namely an affidavit from a "French expert" to the effect that the phrase "du domicile du transporteur" contained in the official French text of Article 28 can be interpreted to mean any place where the carrier carries on business on a regular and substantial basis.

While the "bootstrap" nature of petitioners' affidavit is obvious, respondent Air France will additionally point out that whatever credibility petitioners' affidavit might have is totally destroyed by the fact that the "domicile" forum in Article 28 has specifically been the subject of interpretation by the French courts. Set forth as "Appendix B" to this brief is a certified translation of a decision of the Tribunal de Grande Instance de Paris, dated April 28, 1978, in an action entitled *Zimonyl* v. *Varig.* That action, which arose out of the crash of a Varig Airline Boeing 707 near Paris on July 11, 1973, involved a claim for the wrongful death of a passenger who was travelling on that flight pursuant to a contract of carriage issued in Budapest, Hungary calling for transportation from Budapest to Rio de Janeiro, Brazil, and return. Plaintiff, while conceding Varig's principal place of business was in Brazil, attempted to argue that the "domicile" of Varig, for the purposes of Article 28, could be regarded as Paris, since the airline had a ticket office there. The Paris court specifically rejected plaintiff's contention, holding that a corporation can have only one

domicile, which in the case of Varig was in Brazil where it was incorporated and had its principal place of business. It is apparent, therefore, that "du domicile du transporteur" has been given the same meaning by the French courts as "domicile of the carrier" in the United States decisions.

Accordingly, *no authority* exists for the interpretation of the word "domicile" propounded by petitioners. To the contrary, authority in the United States and abroad is unanimous to the effect that the "domicile" of an air carrier is its place of incorporation, and does *not* constitute any place where the carrier carries on business on a regular and substantial basis.

POINT III

The provisions of Article 28 of the Warsaw Convention clearly relate to subject matter jurisdiction.

Just as baseless and unfounded as petitioners' "domicile" argument is their argument that respondent Air France somehow waived the provisions of Article 28 of the Warsaw Convention by not filing a special appearance in the action instituted in the Circuit Court of Cook County, Illinois.

The circumstances under which a party must enter a special appearance in an action in Illinois are specifically set forth in the *Illinois Civil Practice Act*, Ill. Rev. Stat., Ch. 110, § 20(1) (1975) (emphasis supplied):

> "§ 20. Special Appearance. (1) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court *over the person of the defendant.* A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance."

The essential problem with petitioners' argument relating to the manner in which respondent Air France originally appeared in this action is that it does not involve an issue which is subject to the jurisdiction of this Court. There has been no provision for a special appearance in the Federal Rules of Civil Procedure since 1938. 15 Wright & Miller, *Federal Practice and Procedure,* § 3829, at 196 (1976). Accordingly, the manner by which the Illinois courts interpret the provisions of Article 28 with respect to the somewhat unique pleading practices of that state can hardly constitute a federal question subject to review by this Court under 28 U.S.C. § 1257(3).

At any rate, as was aptly observed by the Illinois Supreme Court in its decision, petitioners have made their argument relating to the nature of Article 28 of the Warsaw Convention "without citation of any supporting decision". 74 Ill. 2d 90, 383 N.E. 2d at 983.

The leading case involving the interpretation of Article 28 of the Warsaw Convention is *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798 (2d Cir. 1971), already discussed at length in this brief. In reversing the district court's denial of defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, the Second Circuit held (452 F.2d at 801):

> "We agree, however, that Article 28(1) '. . . must be considered as absolute and mandatory, on the national level, in the jurisdictional sense, and be given [its] proper status as a treaty obligation of our nation without equivocation.' The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to domestic laws of the United States. U.S. Const. art. VI. . . ."

Having held that the provisions of Article 28(1) relate to jurisdiction, the Second Circuit in *Smith* went on to explain the manner by which courts must apply Article 28 to the facts of a particular action (452 F.2d at 802):

> "We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a), which permits cases *arising under* United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332(a)(2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate."

It is therefore apparent that the Second Circuit in *Smith* referred to Article 28 as "treaty jurisdiction" merely to differentiate the Article 28 limitations from the other limitations on the *subject matter jurisdiction* of Federal Courts that are based on Article III of the United States Constitution and the jurisdictional provisions of the United States Code.

In numerous decisions since *Smith,* courts have granted motions to dismiss for lack of *subject matter* jurisdiction because of the operation of Article 28. *McCarthy* v. *East African Airways Corp.,* 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.,* 517 F.2d 1395 (2d Cir. 1975); *Butz* v. *British Airways,* 421 F.Supp. 127 (E.D. Pa. 1976), *aff'd mem.,* 566 F.2d 1168 (3d Cir. 1977); *Karfunkel* v. *Compagnie Nationale Air France,* 427 F.Supp. 971 (S.D.N.Y. 1977); *Rinck* v. *Deutsche Lufthansa,* 57 App. Div. 2d 370, 395 N.Y.S.2d 7 (1st Dep't 1977), *aff'd,* 44 N.Y. 2d 714 (1978);

Varkonyi v. *Impressa de Viacao Airea Rio Grandense (Varig),* 71 Misc.2d 607, 336 N.Y.S.2d 193 (Sup. Ct., N. Y. Co. 1972).

Therefore, no basis exists for petitioners' interpretation of the "treaty jurisdiction" term employed by the Second Circuit in *Smith.* However, petitioners do more than argue that "treaty jurisdiction" does not constitute subject matter jurisdiction. They assert, as they must in view of the specific language of Section 20(1) of the Illinois Civil Practice Act, that the provisions of Article 28 can be equated with jurisdiction *over the person.* Such argument absolutely flies in the face of the specific holding of the Second Circuit in *Smith.* That decision, in its discussion of the jurisdictional nature of Article 28 of the Warsaw Convention, declares unequivocally that the concept of "treaty jurisdiction" employed by that court with respect to Article 28 has *absolutely no relation* to the domestic law notion of jurisdiction *over the person* (452 F.2d at 800, n. 4):

> "No question of *in personam* jurisdiction was raised in this case, although such jurisdiction is also an important element of the power of a court to decide a case."

Similarly, in *Benjamins* v. *British European Airways,* 572 F.2d 913 (2d Cir. 1978), *cert. denied,* —— U.S. —— (1979), a wrongful death action arising out of the crash of a British Airways aircraft in England, the Second Circuit made a parallel observation in discussing the application of the provisions of Article 28 to the facts of that action (572 F.2d at 915, n. 4):

> "Personal jurisdiction is not an issue in this case, as each defendant has submitted to the *in personam* jurisdiction of the court."

No clearer indication of the fallacy of petitioners' argument relating to the nature of Article 28 exists than the

above two quotes from the Second Circuit's *Smith* and *Benjamins* decisions. Petitioners have based their argument that the provisions of Article 28 of the Warsaw Convention do not relate to subject matter jurisdiction *primarily* upon the "treaty jurisdiction" language employed by the Second Circuit in *Smith*. At the same time, petitioners *completely ignore Smith* when they argue that the provisions of Article 28 of the Warsaw Convention can be equated with the domestic notion of jurisdiction *over the person*.

POINT IV

The provisions of the Warsaw Convention are clearly constitutional and, in any case, the issue of the constitutionality of the Warsaw Convention was not properly raised before the Illinois Supreme Court.

Petitioners accuse the Illniois Supreme Court of "gross misrepresentation" of the record which they assert "is tantamount to an unconstitutional denial of due process and equal protection to the plaintiffs." It should be pointed out that petitioners never moved in the Illinois Supreme Court for a rehearing, in order to refer that court to its alleged misrepresentation of facts in the record. Such a petition is a pre-requisite to accusing the highest court of the State of Illinois of "gross misrepresentation."

Petitioners also include in their brief to this Court an extended discussion of the alleged unconstitutionality of the Warsaw Convention. Such discussion, however, was *not included* in their brief to the Illinois Supreme Court, and the constitutionality of the Warsaw Convention was not among the questions certified for review by the Illinois Supreme Court from the decision of the Circuit Court of Cook County, Illinois. While the decision of the Illinois Supreme Court briefly discusses the allegation of unconstitutionality of the Warsaw Convention, giving this allegation the short shrift that it deserves, it is apparent that the Illinois Supreme Court was of the opinion that petitioners had "waived their point as to unconstitutionality in this court under our Rule 341(e)(7) (58 Ill. 2d, R.341(e)(7))". 74 Ill. 2d 90, 383 N.E.2d at 984. It is therefore submitted that petitioners have failed to properly preserve this issue for review by this Court.

In any case, as the Illinois Supreme Court aptly observed, the petitioners are unable to cite "any decision holding the Convention invalid, either with respect to Article 28(1) or otherwise". 74 Ill. 2d 90, 383 N.E.2d at 984. To the contrary, this Court, in *Duke Power Co.* v. *Carolina Env. Study Gp.*, 57 L.Ed.2d 595 (1978), recently commented that statutes and treaties such as the Warsaw Convention, specifically as they relate to limitations on liability, have "consistently been enforced by the courts". 57 L.Ed.2d at 620-621, n. 32. On many other occasions the Warsaw Convention has been held to be constitutional. *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1978); *McCarthy* v. *East African Airways Corp.*, 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.*, 517 F.2d 1395 (2d Cir. 1975); *Garcia* v. *Pan American Airways*, 183 Misc. 258, 50 N.Y.S.2d 250, *aff'd*, 269 App. Div. 287, 55 N.Y.S.2d 317, *aff'd*, 295 N.Y. 852, *cert. denied*, 329 U.S. 741 (1946); *Kelley* v. *Sabena*, 242 F.Supp. 129 (E.D.N.Y. 1965); *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957); *Indemnity Insurance Company of North America* v. *Pan American Airways*, 58 F.Supp. 338 (S.D.N.Y. 1944).

In fact, no appellate court, state or federal, has ever held the Warsaw Convention to be unconstitutional. Nor has this Court ever held *any* treaty of the United States invalid on constitutional grounds.

A constitutional challenge to the provisions of Article 28(1) was clearly rejected in a decision squarely on point with petitioners' claim against Air France herein. *Mc-*

Carthy v. *East African Airways Corp.*, 13 Avi. 17,385 (S.D.N.Y. 1974), *aff'd mem.*, 517 F.2d 1395 (2d Cir. 1975). That decision emanated from the very sort of motion that was granted by the Supreme Court of Illinois—a motion to dismiss for lack of subject matter jurisdiction pursuant to Article 28 of the Warsaw Convention. The court in *McCarthy* granted the airline's motion to dismiss, and in its decision the court rejected the same constitutional argument relating to Article 28 that the petitioners are presenting to this Court (13 Avi. at 17,386):

> ". . . [P]laintiffs' argument that Article 28(1) of the Convention unconstitutionally deprives them of the right to litigate in the Federal Courts must fail. The jurisdiction of the Federal Courts extends only as far as Congress permits, which in some cases is less than the limit of the federal jurisdictional power as set forth in Article III of the Federal Constitution. *Sheldon* v. *Sill*, 49 U.S. 441 (1850); *Jaconski* v. *Advisun Corp.*, 359 F.2d 931 (3d Cir. 1966); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). As a treaty provision having the force and effect of the domestic laws of the United States, Article 28(1) of the Warsaw Convention may and does constitutionally restrict the subject matter jurisdiction of this Court."

POINT V

As to the applicability of the doctrine of *forum non conveniens* to this lawsuit.

Air France moved to dismiss this action upon the ground that the Circuit Court of Cook County, Illinois lacked jurisdiction of the action by virtue of Article 28 of the Warsaw Convention, and upon the further ground that the suit should be dismissed under the doctrine of *forum non conveniens*. Singapore moved to dismiss the action upon the latter ground only.

The Supreme Court of Illinois granted defendants' motions and directed that the order of the Circuit Court of Cook County, Illinois denying the motion of Air France and of Singapore to dismiss the action be vacated and the court remanded the case to the Circuit Court of Cook County with directions to dismiss the action as to Air France and Singapore. It is obvious that the Supreme Court of Illinois, in dismissing the lawsuit against Air France upon the ground that the suit was barred as to it by the Warsaw Convention, felt it unnecessary to pass upon Air France's alternative motion to dismiss upon the ground of *forum non conveniens*. In fact the court made that very clear (74 Ill. 2d 90, 383 N.E.2d at 984):

> "For the reasons given, we hold that the trial court was in error in denying the motion by Air France to dismiss it from the suit on the ground that suit was barred by the Warsaw Convention.
>
> While the foregoing discussion disposes of the appeal by Air France, there remains to be considered the appeal by Singapore, which, since the complaint did not allege any injury to its own passengers, so as to make the Warsaw Convention applicable, based its motion solely on the ground that the doctrine of *forum non conveniens* required dismissal of the case.
>
> Our holding that the plaintiffs' suit against Air France could not be brought in Cook County because of the Warsaw Convention would seem to diminish, if not eliminate, the suitability of Cook County as a forum for the plaintiffs. The dismissal of Air France from the suit removes the base of the plaintiffs' desire to retain Singapore in the circuit court of Cook County."

The court thereafter reviewed the Illinois law with respect to *forum non conveniens* and dismissed the lawsuit upon that ground as to Singapore. It is obvious from the opinion of the court that, had it not dismissed the ac-

tion against Air France on the basis that the suit against it was barred by the Warsaw Convention, it would have dismissed the action against Air France upon the ground of *forum non conveniens.*

While the Illinois Supreme Court's discussion of the doctrine of *forum non conveniens* does not directly constitute its grounds for dismissal of petitioners' claims against Air France, said respondent feels constrained to comment upon several of the points raised by petitioners in their brief with respect to this issue.

First, petitioners appear to claim that the Illinois Supreme Court's alleged failure to apply the *forum non conveniens* principles announced in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), violated their constitutional rights. Petitioners are unable, however, to cite even *one case* which decided the *forum non conveniens* doctrine on a constitutional basis. *Gilbert* was not based on constitutional considerations, but on the inherent discretion of federal courts of law and equity to decline to exercise jurisdiction even where they otherwise may have jurisdiction over the parties and subject matter; and where the venue of the action may otherwise be proper. Petitioners attempt to raise the standards set forth in *Gilbert* to federal constitutional dimensions. No court has ever done so. The doctrine of *forum non conveniens* is a doctrine based on equitable principles within the discretion of *each court system.* As such, the application of the doctrine by the Supreme Court of Illinois is a matter of state law and is not subject to review by the United States Supreme Court under 28 U.S.C. § 1257(3).

Second, petitioners' entire argument concerning *forum non conveniens* is grounded upon the allegation that no jurisdictional barriers exist to suit against the three named defendant airlines in the Circuit Court of Cook County, Illinois. However, discussion of the issue of *forum non conveniens* in the decision of the Illinois Supreme Court

does not even commence until after that court's dismissal of the claims brought against Air France for lack of jurisdiction under Article 28 of the Warsaw Convention. Since, as has been demonstrated in this brief, the Illinois Supreme Court was clearly correct in holding that Article 28 precluded suit by petitioners against Air France in the Circuit Court of Cook County, Illinois, it is submitted that petitioners' entire discussion of the issue of *forum non conveniens* is based upon a false premise and is entirely irrelevant.

Third, petitioners' allegation regarding the amenability to suit of the three defendant airlines in the Circuit Court of Cook County, Illinois, also conveniently ignores the fact that the third defendant airline, Gulf Air Lines, Inc., has filed a motion to dismiss petitioners' actions against it for lack of jurisdiction over the person. While petitioners mention in their brief (p. 14) that decision on that motion has been stayed pending the outcome of this petition for a writ of certiorari, petitioners' brief is written as though Gulf Air's motion had already been denied.

Finally, and most importantly, respondent Air France must emphasize once again that petitioners have completely failed to mention in their brief that timely actions have been filed against Air France in either Israel, France or Canada on behalf of *all* the passengers of the hijacked Air France aircraft who were named in the action brought in the Circuit Court of Cook County, Illinois. A complete list of the passengers whose claims have been brought against Air France in the courts of Israel, France and Canada accompanies this brief as "Appendix A".

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Air France

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APPENDIX A

The following is a list of plaintiffs whose cases were dismissed by order of the Supreme Court of Illinois and who instituted actions against Air France in Canada, France or Israel shortly before the prescriptive period expired under Article 29 of the Warsaw Convention.

MONTREAL, CANADA:

Salomon Weizman
Anna Morina (Ninette Anna Benaroche)

PARIS, FRANCE:

Sylver Ayache
Maurice Benshimon (Maurice Bensimon)
Sofie Zaoui Chamak (Sophie Chamak)
Jean-Marc Dahan
Miriam Field (Myriam Field)
Mendel Liebesman (Mendel Liebesmann)
Jocelyn Mounnier (Jocelyne Monnier Lanners)
Georgette Poúlain (Georgette Poulain Bettleheim)
Solomon Rubin (Charles Salomon Rubin)
Regine Rubin
Dov Shlaen (Dov Boris Shlaen)
Elie Silvera (Claude Silvera)
Gilbert Weill
Héléne Weill (Héléne Rosenblum Weill)
Oliver Cojot (Olivier Cojot)
Palu H. Baries, as administrator of the estate of Ida Borukchovitch (Paul Baris, as administrator for the estate of Ida Boruchovitch)

TEL AVIV, ISRAEL:

Eitan Aronowitch
Miram Aronowitch
Estate of Dora Block
Arieh Brodsky
Yael Brodsky
Anat Brodsky
Dana Brodsky
Estate of Pasco Cohen
Hannah Cohen
Yaakov Cohen
Tzipporah Cohen
Michael Cojot
Nahoum Dahan
Ichak David
Hadasza Agnes David
Uzi Davidson
Sara Davidson
Ron Davidson
Benjamin Davidson
Yehuda Gottlieb (Gotlieb)
Regina Gottlieb (Gotlieb)
Baruch Gross
Ruth Gross
Shy Gross
Ilan Hartuv
Itzchak Hirsh
Lili Hirsch
Akiva Laxer (Avida Laxer)
Joseph Aboujdid
Ezra Almog
Janet Almog
David Benitah
Odette Benitah
Yoram Benitah
Esther Dahan

Alkeslassy Heftsibah (Eskelassy)
Arno Hilf
Nadia Israel
Zeev Josepovici (Iosipovic)
Hara Josepovici (Iosipovic)
Monique Khalepski-Epstein (Kaplansky-Epstein)
Jerachmiel Kiper (Kipper)
Rina Kiper (Kipper)
Lifsa Lazarovici (Lazarovicz)
Ada Lazarovici (Lazarovicz)
Chana Lenczner
Michael Livni
Michael Rabinovitz
Rivka Rabinovitz
Renata Reisfeld
Abraham Rubinstein
Gavriela Rubinstein
Michal Warshavsky
Elie Roger Zeitan
Aimee Aouva Zeitan (Zerbit)
Hana Zriehn (Zeritan)
Claude Rosenkovitch
Emma Rosenkovitch
Noam Rosenkovitch
Ella Rosenkovitch
Patricia Martell
Estate of Jean-Jacques Mimouni

APPENDIX B

BERLITZ TRANSLATION SERVICE
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BERLITZ

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40 West 51st Street
New York, New York 10020
Telephone: (212) 765-1000

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

CERTIFICATION

This is to certify that the attached translation No. 26734 is, to the best of my knowledge and belief, a true and accurate rendition into English of a Judgment rendered in the matter of Zimonyl vs. Varig Company, written in French.

New York, New York, the 22nd day of June 1978.

BERLITZ TRANSLATION SERVICE
EBH
Eileen B. Hennessy

Subscribed and sworn to before me
on this the 22nd day of June 1978.

Notary

(Seal)

ALBERT J. LAMOTHE, JR.
Notary Public, State of New York
No. 30-7410630
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1980

COURT OF FIRST INSTANCE OF PARIS

First Division
Section Two

HEARING OF: April 28, 1978
IN THE MATTER OF: Zimonyl, widow of Hegedus
AGAINST: Varig Co.
SUBJECT: Lack of Jurisdiction.

No. 17.345/77
ASS/8-11-75
Lack of Jurisdiction

JUDGMENT RENDERED ON APRIL 28, 1978,
BY THE COURT OF FIRST INSTANCE OF PARIS

FIRST DIVISION—SECOND TWO

PLAINTIFF:

Mrs. Emese Zimonyl, widow of Mr. Bela Hegedus, residing at Tusnadi u. 25, Budapest, Hungary,

represented by:
Joseph Caporal, Attorney at Law

DEFENDANT:

VARIG Airlines (EMPRESA DE AEREA RIO GRANDESE), with headquarters at 365 Avenue Almirante Sylvio de Noroanha, Rio de Janeiro, Brazil, and with its general agency for France at 27 Avenue des Champs Elysées, Paris 8,

represented by:
André Garnault, Attorney at Law

THE PUBLIC PROSECUTOR

Mr. Boittiaux, Deputy

MEMBERS OF THE COURT

Magistrates sitting:

Mr. Metayer, Presiding Judge
Miss Cochard, First Judge
Mrs. Tarabeux, Judge

SECRETARY-CLERK OF THE DIVISION:
Mr. Michaud.

PLEADINGS: At the public hearing of March 17, 1978.

JUDGMENT: Pronounced in public session after hearing both parties—subject to objection

x

x x

1) FACTS AND PROCEEDINGS

On July 11, 1975, Mrs. Emese Zimonyl, widow, served a summons upon the Brazilian company EMPRESA DE VIACAO AEREA RIO GRANDESE (logo VARIG), for interim payment of the sum of 4,200,000 Francs, representing damages occasioned by the death of her husband, Bela Hegedus, in the air crash of July 11, 1973, near Saulx-les-Chartreux (Essonne).

By Court document of June 16, the VARIG Company, based on the provisions of Article 28 of the Warsaw Convention, alleged:

1) Territorial non-jurisdiction of the Court of the First Instance of Paris as against the Federal Court of Rio de Janeiro;

2) Plea of suit pending elsewhere, the plaintiff having also brought an action for the same claims before the Court of First Instance of Corbeil.

In her pleadings of March 2, 1977, Mrs. Hegedus maintained that the Court of Paris did have jurisdiction, as the VARIG Company has a domicile at 27 Avenue des Champs Elysées, Paris, where the summons was served upon it.

She further alleged that the existence of a rule of *lis alibi pendens* between French and foreign courts was at the very least questionable; and declared that she had no objection to postponement of a decision on her application for relief until a decision was made on the actions pending before foreign courts and contesting the *lis pendens* in France, the summons before the Court of Corbeil not having been returned.

In its answer, dated March 7, 1978, the Varig Company declared that Article 28 of the Warsaw Convention did not place an agency on the same footing as the domicile of the carrier, and that a mere decentralized office, such as that of Paris, determined a special jurisdiction only if it had issued the transportation contract concerned, which is not the case here as regards Varig's agency in Paris;

Wherefore it was pleading lack of jurisdiction.

II—ARGUMENT

Whereas Article 28 of the Warsaw Convention, applicable in France, provides that an action for liability must be brought before one of four courts, restrictively listed, at the choice of the plaintiff:

—That of the carrier's domicile;

—That of the principal headquarters for its operation;

—That of the place where it has an office which entered into the contract;

—That of the place of destination.

Whereas the plaintiff maintains that the Varig Company has a domicile in Paris at its agency at 27 Avenue des Champs-Elysées; whereas this domicile is of necessity separate from the principal headquarters of its operation, since it is mentioned separately in the list of the places of possible jurisdiction;

Whereas Mr. Hegedus's ticket was written in Budapest by the Malev Company for a trip from Budapest and return by way of Rio de Janeiro and Paris;

Whereas the principal headquarters of the defendant is at Rio de Janeiro, and Paris is only one of its agencies and is not the agency that made the contract;

Whereas, in contrast to Mrs. Hegedus's allegation, Paris cannot be the carrier's domicile, as a person, whether physical or legal, can have only one domicile, which in this case is Rio de Janeiro, the headquarters of the Varig Company;

Whereas Article 28 hereinabove cited uses the word "domicile" in the singular, and does not take into consideration the location of the establishment or agency unless the contract was made there;

Whereas Mrs. Hegedus's interpretation of the idea of domicile actually refers to the so-called jurisprudence of "principal stations," which is an essentially domestic attack on the principle of uniqueness of domicile and cannot be internationally applied without a specific text; wherefore Article 28 § 1 of the Warsaw Convention cannot be subjected to an incorrect extension that it does not have;

Whereas in this case the domicile of the Varig Company is the same as the principal headquarters of its operation, and is its corporate headquarters; whereas it is located at Rio de Janeiro, which fact excludes any competence of the Court of First Instance of Paris to be seized of Mrs. Hegedus's action for liability;

Whereas in these conditions the objection of lack of jurisdiction raised by the Varig Company should be admitted, and in accordance with Article 96 § 1 of the New Code of Civil Procedure competence should be disclaimed;

WHEREFORE

the Court, in public session, rendering judgment after hearing both parties and subject to objection,

Disclaims competence,

Dismisses both parties,

Orders Mrs. Hegedus to pay the expenses that may be paid directly by André Garnault, the attorney retained, provided he paid same out of his own pocket without advance therefor.

So made and adjudged in Paris on April twenty-eighty, one thousand nine hundred seventy-eight.

The Secretary-Clerk The Presiding Judge

Drawn up by: Mr. Metayer

Supreme Court, U. S.
FILED
APR 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1337

THE HONORABLE LOUIS J. GILIBERTO, Judge of the Circuit Court of Cook County, Illinois, *et al.*, EITAN ARONOWITCH, *et al.*,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT SINGAPORE'S BRIEF IN OPPOSITION TO THE PETITION

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Cases Cited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1337

THE HONORABLE LOUIS J. GILIBERTO, Judge of the Circuit Court of Cook County, Illinois, *et al.*, EITAN ARONOWITCH, *et al.*,

Petitioners,

v.

COMPAGNIE NATIONALE AIR FRANCE and SINGAPORE AIRLINES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT SINGAPORE'S BRIEF IN OPPOSITION TO THE PETITION

The respondent Singapore Airlines, Ltd. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Illinois in this case. That opinion is reported at 74 Ill. 2d 90, 383 N.E. 2d 977 (1978).

Reasons Why the Writ Should be Denied

Because none of the plaintiffs-petitioners was a passenger of Singapore Airlines, Ltd. (Singapore), the provisions of the Warsaw Convention do not apply to Singapore.

Accordingly, Singapore limits its brief in opposition to Argument VI of the petition which relates to the doctrine for *forum non conveniens.*

Singapore respectfully submits, however, that unless this Court should elect to reverse the decision of the Illinois Supreme Court with respect to Article 28(1) of that Convention, the issue of *forum non conveniens* is, for all practical purposes, moot. In fact, even if this Court accepts the petition as to Article (28) and Air France, nevertheless it should deny the petition in so far as it refers to the forum argument and Singapore.

1. Argument VI of the petition fails to present any federal question of substance appropriate for review by the Supreme Court of the United States within the context of Rule 19 of this Court.

When its emotional rhetoric is pared away, Argument VI of the petition (pages 62 through 75) clearly fails to raise any genuine issue of due process. Nowhere is it suggested that any of the eighty-one plaintiff-petitioners has been or will be deprived of at least one appropriate and convenient forum. All that is raised in Argument VI is the concern that it may not prove possible for all of the plaintiff-petitioners to sue both of the respondents and Gulf Air Lines in the same forum.

Petitioners cite no authority whatsoever for their contention that eighty-one aliens, citizens of several countries, must as a constitutional right of due process, be guaranteed access to the same forum for the convenience of their American counsel.

No such right exists.

Nor, as pointed out by the Illinois Supreme Court (pages 12a and 13a of the petition) does the constitutional right of due process guarantee any person, or group of persons, the absolute right to sue in a single forum as many defendants as they care to name.

Assuming, however, that it might be possible for plaintiff-petitioners to sue both respondents and Gulf Air Lines in Cook County, Illinois, such a possibility is not a right but merely an opportunity which might be an element of convenience to them or their counsel.

It would, at most, be only one of several elements of convenience which the Illinois Supreme Court considered in accordance with the guidelines of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 91 L. Ed. 1055 (1947).

It is clear from its opinion that the Illinois Supreme Court considered carefully all of the appropriate elements of the doctrine of *forum non conveniens* and found the balance strongly in favor of the application of that doctrine.

This Court has never attempted ". . . to catalogue the circumstances which will justify or require either grant or denial . . ." of the remedy of *forum non conveniens. Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508, 91 L. Ed. 1055, 1062 (1947). Nor has it ever attempted to substitute its own judgment for that of a lower court in the relative weighing of such circumstances.

While complaining of a deprivation of due process, plaintiff-petitioners have offered no authority which suggests that any such right has been denied to them. In

reality, they merely ask this Court to reconsider the same factors which the Illinois Supreme Court has already carefully weighed.

Such a request does not raise a federal question appropriate for review by this Court.

2. The Illinois Supreme Court properly found the balance of factors strongly in favor of the application of the doctrine of *forum non conveniens*.

As was noted by the Illinois Supreme Court, "It is difficult, indeed, to assume a situation in which the parties and operative facts of a case have a lesser connection with the forum of Cook County." (page 16a of petition).

None of the events giving rise to this litigation occurred within the Western Hemisphere, let alone in Illinois.

None of the plaintiff-petitioners is a citizen of the United States; and none purchased his ticket, or commenced or terminated his flight in this country.

No source of proof, either on the issues of liability or damages, is located in Illinois or in the United States. In this respect, this litigation differs significantly from aircraft crash cases such as *Varkonyi* v. *S. A. Empreso De Viaco Airea Rio Grandense* (Varig), 22 N.Y. 2d 333, 239 N.E. 2d 542 (1968), wherein witnesses and voluminous documents relating to product liability claims against domestic manufacturers were located in the United States.

And, the limited contacts which the respondents and Gulf Air Lines have with the State of Illinois have absolutely no connection with the occurrence giving rise to this litigation.

The Illinois Supreme Court properly and carefully weighed the relative access to sources of proof; the availability of potential witnesses; the familiarity of the forum with potentially applicable substantive law; the crowded dockets of the courts of Illinois; and all the other practical problems that make trial of a case easy, expenditious and inexpensive.

That court, after hearing oral argument and considering hundreds of pages of documents submitted by petitioners, properly found that the Circuit Court of Cook County was ". . . a distant, uninvolved and inappropriate forum in relation to the parties and incidents that occurred thousands of miles from Illinois." (page 20a of petition).

3. Singapore has guaranteed each of the eighty-one plaintiff-petitioners access to a suitable and more convenient forum.

In its motion to dismiss, Singapore assured the plaintiff-petitioners that, "Upon dismissal of this action . . . Singapore . . . is prepared to defend this lawsuit, whether as sole defendant or with others, in the United Kingdom." (page 25a of petition).

Obviously, Singapore cannot speak for Compagnie Nationale Air France or Gulf Air Lines, nor should it be expected to do so.

As shown above, the eighty-one plaintiff-petitioners have no absolute right, by due process or otherwise, to sue both of the respondents and Gulf Air Lines in a single forum. None of the cases which petitioners cite supports their contention that multiple defendants must guarantee multiple plaintiffs a single alternative forum.

Singapore has fully complied with the requirement that it assure the plaintiff-petitioners access to an alternative forum, i.e. the United Kingdom, or Singapore.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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